FILE COPY

JAN 2 1970

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1026

ALFREDO ESTEBAN and STEVE CRAIG ROBERDS,
Petitioners,

vs.

CENTRAL MISSOURI STATE COLLEGE, WARREN C. LOVINGER, President, and W. LESTER SIMPSON, President and JOE HERNDON, LELAND J. CULP, VIRGINIA GOTTLIEB, BYRON CONSTANCE, and J. N. CUNNINGHAM, Members of the Board of Regents of Central Missouri State College,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

IRVING ACHTENBERG
531 Walnut
Kansas City, Missouri 64106
Attorney for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

TABLE OF CONTENTS

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Constitutional Provisions and College Regulations Involved 3
Statement of the Case 5
The Facts 5
A. Esteban Events 6
B. Roberds Events 8
C. Summary of Evidence 11
Reasons for Granting the Writ 12
I. There Is a Direct Conflict Between Circuits 12
II. Importance of Questions Presented 14
III. Decision Below Is Believed to Be Erroneous 15
A. College regulations and lower court decisions deny First Amendment right of free speech and assembly 15
B. College regulations are vague and overbroad in violation of First and Fourteenth Amendments 20
(1) Vagueness 20
(a) Doctrine applies to college regulations 20
(b) Regulations are void for vagueness 22
(2) Overbreadth 26
(3) Students may attack vagueness and overbreadth regardless of own conduct 30
C. Due process requires substantial evidence to support disciplinary action 30
Conclusion 33

Appendix—

A. Opinion of the District Court A1
B. Majority Opinion of the Court of Appeals A19
C. Dissenting Opinion in the Court of Appeals A42

Table of Cases

Amalgamated Food Employees Union v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) 17
Ashton v. *Kentucky*, 384 U.S. 195, 16 L.Ed.2d 469, 86 S.Ct. 1407 22
Baggett v. *Bullitt*, 377 U.S. 360 (1964) 27
Baker v. *Bindner*, 274 F.Supp. 658 (1967) 23, 24, 25
Barker v. *Hardway*, 283 F.Supp. 228 (1968) 19, 21
Barr v. *Columbia*, 378 U.S. 146, 12 L.Ed.2d 766, 769, 84 S.Ct. 1734 33
Bozza v. *U. S.*, 330 U.S. 160, 91 L.Ed. 818, 67 S.Ct. 645 .. 20
Bridges v. *California*, 314 U.S. 252, 263 16
Buckley, William F. v. *John J. Meng, President of Hunter College*, 230 N.Y.S.2d 924 21
Carmichael v. *Allen*, 267 F.Supp. 985, 997-8 25
Connally v. *General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926) 22
Cox v. *Louisiana*, 379 U.S. 536 (1965) 25
Dickey v. *Alabama State Board of Education*, 273 F.Supp. 613 17
Dickson v. *Sitterson*, 280 F.Supp. 486, 498 (M.D.N.C. 1968) 21
Dixon v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961) 14
Dombrowski v. *Pfister*, 380 U.S. 479 (1965) 28, 33
Edwards v. *South Carolina*, 372 U.S. 229, 235 15
Elfbrandt v. *Russell*, 384 U.S. 11 (1966) 23

Esteban, et al. v. *Central Missouri State College, et al.*, 277 F.Supp. 649 (Esteban I) 8

Esteban, et al. v. *Central Missouri State College, et al.*, 290 F.Supp. 612 (Esteban II) 1, 8, 11, 16, 31

Esteban v. *Central Missouri State College*, 415 F.2d 1077 (8th Cir.) 2

Ex Parte Coder, 44 S.W.2d 179 18

First Unitarian Church v. *Los Angeles County*, 357 U.S. 545 16-17

In re Gault, 387 U.S. 1 (1967) 23

Hammond v. *South Carolina State College*, 272 F.Supp. 947 ..... 17, 21

Hunter, et al. v. *Allen*, 286 F.Supp. 830, 836-9 (D.C. Ga.) 18, 25

Jones v. *Tenn. Board of Educ.*, 279 F.Supp. 190 (M.D. Tenn. 1968) aff'd 407 F.2d 834 (6th Cir. 1969), cert. granted 38 U.S.L.W. 3142 (U.S. Aug. 13, 1969) (No. 731) 15

Keyishian v. *Board of Regents of New York*, 385 U.S. 589, 87 S.Ct. 675 ..... 21, 23, 27, 28

Lair v. *State of Oklahoma*, 316 P.2d 225 19

Landry v. *Daley*, 280 F.Supp. 938 (D.C. Ill. 1968) 18

Marsh v. *Alabama*, 326 U.S. 501 (1946) 17

Mempa v. *Rhay*, 36 U.S.L.W. 4009 (Nov. 14, 1967) 23

N.A.A.C.P. v. *Button*, 371 U.S. 415, 432-3, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963) 23, 30

People v. *Most*, 128 N.Y. 108, 27 N.E. 970, 972 19

Pickering v. *Board of Education*, 391 U.S. 563 (1968) .. 21

Rollins v. *Shannon*, 292 F.Supp. 580 (D.C.E.D.Mo., 1968) 18

Schneider v. *State*, 308 U.S. 147 16

Scoggins v. *Lincoln University*, 291 F.Supp. 161, 169 19

Small, A. B. v. *American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925) 22

Snyder v. *Board of Trustees*, 286 F.Supp. 927 (N.D. Ill., 1968) 25

Soglin v. *Kauffman*, 295 F.Supp. 978 (D.C. Wisc. 1968), affirmed No. 17427 (7th Cir., Oct. 24, 1969) 12, 25, 28, 30

Speiser v. *Randall*, 357 U.S. 513 16

Terminiello v. *Chicago*, (1949) 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 ..... 18, 24

Thornhill v. *Alabama*, (1940) 310 U.S. 88, 97-98, 60 S.Ct. 736, 84 L.Ed. 1093 17

Tinker v. *Des Moines School Dist.*, 393 U.S. 503 30

U.S.A. v. *Commonwealth of Pennsylvania*, 273 F.Supp. 923, 926 (1967) 33

United States v. *Romano*, 382 U.S. 136, 15 L.Ed.2d 210, 213, 86 S.Ct. 279 20

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 17

Whitehall v. *Elkins*, 389 U.S. 54 (1967) 23

Zanders v. *Louisiana State Board of Education*, 281 F. Supp. 747, 769 (U.S. D.C. La.) (1968) 19

Zwicker v. *Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967) 22

Constitutional Provisions

First Amendment to the Constitution of the United States 3, 15, 16, 17, 25, 27, 28, 33

Fourteenth Amendment to the Constitution of the United States 3, 15, 27, 33

TEXTS

Wise on Riots and Unlawful Assembly 4th Ed. 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. .....

ALFREDO ESTEBAN and STEVE CRAIG ROBERDS,
Petitioners,

vs.

CENTRAL MISSOURI STATE COLLEGE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on October 3, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri is reported at 290 F.Supp. 622 (W.D.Mo. 1968), and is printed in Appendix A hereto, *infra*, p. A1.

The majority opinion of the United States Court of Appeals for the Eighth Circuit, affirming the district court, is reported at 415 F.2d 1077 (8th Cir. 1969), and is printed in Appendix B hereto, *infra*, p. A19.

The dissenting opinion of Judge Lay in the Court of Appeals is reported at 415 F.2d 1090, and is printed in Appendix C hereto, *infra*, p. A42.

The certified transcript of the Record in the case filed herewith has been numbered by the clerk in two series, the appendix being numbered pp. 1-18 and the proceedings being numbered pp. 1-54. For simplicity petitioners have renumbered the appendix pp. 1a-18a. References to the transcript are (R. .....a) or (R. .....).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 28, 1969 (R. 38). A timely filed Motion for Rehearing was denied October 3, 1969 (R. 53). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Central Missouri State College violated petitioners' rights to freedom of speech and assembly, as guaranteed by the First and Fourteenth Amendments of the Constitution by suspending petitioners for mere presence at or near a mass gathering of students.

2. Whether a student conduct regulation providing "all students are expected to conform to ordinary and accepted social customs and to conduct themselves * * * in a manner befitting a student of Central Missouri State College" and proscribing "Conduct unbefitting a student which reflects adversely upon himself or the institution",

is unconstitutionally vague and overbroad either facially or as applied to petitioners.

3. Whether a student conduct regulation proscribing "participation in mass gatherings which might be considered as unruly or unlawful" and which deems a student spectator merely present at such gatherings as participating in the proscribed conduct, is unconstitutionally vague and overbroad, either facially or as applied to petitioners.

4. Whether petitioners were denied substantial due process by the college president's findings and those of the lower courts of "participating in an unruly or unlawful mass gathering" without any substantial evidence of participation by petitioners in any unruly or unlawful aspects of the mass gathering.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. *U.S. Const.* amend. I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *U.S. Const.* amend. XIV § 1.

Regulations (from the "Student Handbook"—"Mule Brays" pp. 20-21)

Student Conduct

The conduct of the individual student is an important indication of character and future usefulness in life. It is therefore important that each student maintain the highest standards of integrity, honesty and morality. All students are expected to conform to ordinary and accepted social customs and to conduct themselves at all times and in all places in a manner befitting a student of Central Missouri State College.

All students that enroll at C.M.S.C. assume an obligation to abide by the rules and regulations of the college as well as all local, state and federal laws.

When a breach of regulations involves a mixed group, ALL MEMBERS ARE HELD EQUALLY RESPONSIBLE.

Conduct unbefitting a student which reflects adversely upon himself or the institution will result in disciplinary action.

Mass Gatherings

Participation in mass gatherings which might be considered as unruly or unlawful will subject a student to possible immediate dismissal from the College. Only a few students intentionally get involved in mob misconduct, but many so-called "spectators" get drawn into a fracas and by their very presence contribute to the dimensions of the problems. It should be understood that the College considers no student to be immune from due process of law enforcement when he is in violation as an individual or as a member of a crowd.

STATEMENT OF CASE

Petitioners (hereinafter referred to collectively as "students" or individually by name—Roberds, Esteban) were suspended from Central Missouri State College (hereinafter referred to as "College") for having participated in a mass demonstration.

Suspension was for two semesters (without automatic readmission, but merely the right to reapply). Students filed their complaint in the federal district court seeking reinstatement, charging suspension without proper notice and hearing and violation of their constitutional right to procedural and substantive due process. After a hearing the district court directed that the students be given a new hearing by the college president. See *Esteban* v. *Central Missouri State College*, 277 F.Supp. 649 (Esteban I).

Pursuant to the court's order written charges and notice of hearing before the college president were then served on the students, a new hearing was held and the previous suspensions were affirmed. Students again filed suit in the federal district court seeking reinstatement, a declaratory judgment that the college regulations violate the First and Fourteenth amendments, and expunging of the suspension from their college records. The trial judge dismissed the suit with prejudice. See *Esteban* v. *Central Missouri State College*, 290 F.Supp. 612. Appeal was taken to the Eighth Circuit which, with one dissent, affirmed the trial court. 415 F.2d 1077.

THE FACTS

The charges related to the students' activities in connection with mass student demonstrations occurring the evenings of March 29 and March 30, 1967. These demonstrations took place at the intersection of the public street

adjacent to the school campus and State Highway 13 and overflowed onto the sidewalks and campus. On the evening of March 29, some 350 students were present in the mass and on March 30, there were some 600 students included. As a partial result of these two mass demonstrations there was in excess of $600 damages and destruction of college property, including broken school building windows and destroyed shrubbery; eggs were thrown; the Dean of Men, Dr. Chalquist, was hanged in effigy, his "dummy" torn up and set on fire; traffic was halted and blocked, cars were rocked, and their occupants ordered out into the street. There was, however, no evidence that either student engaged in or organized any of these disruptive or destructive activities.

A. Esteban Events.

On the evening of March 29, 1967, around 11:30 p.m., after having spent the evening studying, he left his dormitory about the time the "disturbance" had subsided. Some of the students were proceeding along the street from the mass demonstration to their dormitories. Esteban was standing on the sidewalk about 100 feet from the scene of the mass demonstration and stayed there awhile, talking to friends. Dr. Meverden, a faculty member, approached Esteban and asked him to go inside the dormitory. Instead of complying, Esteban asked why. He told Dr. Meverden that he was not in violation of any state, county, or federal law and that he had a right to be out there. Dr. Meverden asked for his student identification card which by college regulation he was required to have in his possession. Esteban said he did not have it. Nor did he give his name. Dr. Meverden again requested him to go in the dormitory and get off the street. Esteban argued with Dr. Meverden and questioned his authority, saying there were no rules limiting the time men could stay

outside the dorms. Shortly, and with the encouragement of other students present, he did go into the dormitory. Dr. Meverden also went in and asked Gerald Haddock, the student resident assistant of Esteban's dormitory, who Esteban was. Haddock was overheard by Esteban telling Dr. Meverden Esteban's name. Esteban called Haddock "a prick and a bastard" and told him he "would not be around here very long." Esteban then angrily picked up a waste basket and emptied the contents on the floor.

The charge against Esteban was:

> "contributing to and participating in an unruly and unlawful mass gathering occurring on the 30th day of March, 1967, at and near Central Missouri State College in that you, the said Alfredo Esteban, did resist efforts of one Dr. M. L. Meverden in dispersing said mass gathering, failed and refused to identify yourself to Dr. Meverden as requested and used vile and obscene language towards and threatened a resident assistant of the College at Foster-Knox Hall." (R. 3a) (290 F.Supp. 625).

The college president's pertinent findings against Esteban were:

> "I find that on March 30, 1967, the evidence discloses that Mr. Esteban was found by Dr. Meverden in the vicinity of the demonstration occurring that evening. The evidence discloses that Dr. Meverden first contacted this former student at a point somewhere between fifty feet east of the intersection of Clark and Maguire Streets and the entranceway to Foster-Knox Hall. At that time Dr. Meverden, along with other members of the administration, were attempting to disperse students collected at the demonstration scene and Mr. Esteban, among others, was requested to return to his dormitory. Mr. Esteban inquired of Dr. Meverden as to why he should return to the dormitory and at the original request refused to do as required, whereupon Dr. Meverden asked the former stu-

dent for his identification card. Mr. Esteban advised Dr. Meverden that he did not have his identification card with him and it was not produced. According to Mr. Esteban he then proceeded with Dr. Meverden to the entrance hall of the dormitory where Dr. Meverden then made inquiry of the dormitory resident assistant as to Mr. Esteban's identity.

* * *

I am of the further opinion that this student's resistance to Dr. Meverden's efforts directed towards dispersing the demonstration contributed to the unruly and disorderly situation resulting from the demonstration and unquestionably constituted participation in the mass gatherings even though at the specific time of the occurrence the gathering was in the process of being dispersed." (R. 13a-15a) (Findings, Esteban).

B. Roberds Events.

Sometime prior to the mass demonstrations, Roberds had been placed on disciplinary probation and furnished a written statement of its terms. Dean Chalquist also orally explained those terms to him. Roberds asked about the possible repercussions of his involvement in demonstrations. He was advised "that any action on your part which may reflect unfavorably upon either you or the institution can be considered grounds for suspension." Roberds, about two months earlier, had written E. J. Cantrell, a Representative from his county in the Missouri Legislature, the following letter:

"* * * I assure you, I do not stand alone in my disgust with this institution. From suppression of speech and expression to ridiculous, trivial regulations this college has done more to discourage democratic belief than any of the world's tyrants. * * * My comrades and I plan on turning this school into a Berkeley if something isn't done." (R. 10a).

Throughout both evenings of the mass demonstrations Roberds was present as a part of the crowd. On March

29, 1967, he arrived at the scene of the demonstration about 10:15 p.m. and returned to his dormitory about 10:45 p.m. On March 30, 1967, he arrived at the scene about 9:30 p.m. and remained until about 10:30 p.m. During the first night, while a part of the gathered crowd, he talked to students who were present in it. Roberds testified that the second evening, also while a part of the crowd at the demonstration, that "I discussed some of the things that were going on, the rocking of the cars and the dummy. At that time I mentioned my disgust with the college, and we talked, as the people I had talked to had the same feeling." He saw the dummy brought to the scene of the demonstration; saw it hung, torn up and burned by students in the crowd. He saw the cars approached by the students, saw the cars rocked, saw the attempts to take the occupants out of the cars. He returned to his dormitory after the dispersal of the gathering. He stated he was at the demonstrations each evening simply as a "spectator", not participating in any of the acts of violence or destruction.

The charge against Roberds was:

"contributing to and participating in an unruly and unlawful mass gathering occurring on or about the 29th and 30th days of March, 1967 at and near Central Missouri State College in that you, the said Stephen Craig Roberds on the 5th day of February, 1967 directed correspondence to Mr. E. J. Cantrell of the Missouri Legislature evidencing your intention to participate in such mass gathering, did thereafter advise Dean Hollis Chalquist, Dean of Men, of your intention to participate in such demonstration at which time you were specifically advised that such participation would result in immediate suspension from Central Missouri State College and that you did thereafter continue to contribute to and participate in said mass gathering all of which actions were in violation of the terms and provisions of your disciplinary probation." (R. 3a) (290 F.Supp. 625).

The college president's pertinent findings against Roberds were:

"I find that on the dates of the demonstrations referred to, Mr. Roberds was on disciplinary probation, that he had been advised of his disciplinary probation and the terms thereof. He had been specifically advised both orally and in writing that his participation in such demonstrations would result in immediate suspension from Central Missouri State College. Under these circumstances Mr. Roberds has repeatedly admitted attending the demonstrations on both nights but *qualifies his attendance as being that of a spectator and the evidence does not show otherwise.* It is apparently the former student's position that his presence at the disturbances as a spectator does not constitute a violation of the College regulations relative to mass gatherings. I am of the opinion that it does. At the outset it should be made clear that the very purpose of the regulation is to prevent an unauthorized mass gathering of students which gatherings are by their very nature made up of a great number of spectators. It is the spectators that create the mass which in turn leads, as in this case, to incidents of unruly and violent action. If there were no so called spectators there would be no mass gathering.

Furthermore, the regulation in this instance makes it clear that spectators will be considered to be contributing to the mass gathering and will be subject to similar disciplinary action.

* * *

During this meeting with the Dean of Men, Mr. Roberds inquired of the Dean as to what action, if any, would be taken against him should he take part in a campus demonstration at which time he was advised orally and in writing that such action would result in immediate suspension.

In February of 1967, Mr. Roberds directed correspondence to Mr. E. J. Cantrell, Chairman of the House

Appropriations Committee of the Missouri Legislature, expressing his complete dissatisfaction with the College and stating that he and his comrades intended to turn the Central Missouri State College campus into another Berkeley, obviously referred to the University of California riots of 1964.

Subsequently, Mr. Roberds became involved in the incidents of March 29 and 30, 1967." (R. 16a-18a) (Findings, Roberds) (Emphasis added).

Although the trial court, 290 F.Supp. 631, footnote 9, cites an excerpt from the transcript of Roberds' testimony in Esteban I, to support his finding that Roberds "was not a mere or innocent spectator," the full quotation of Roberds' testimony indicates that Roberds denied that he "was present and participated," but merely testified that he was present on both evenings as a spectator and nothing more. There is nothing in the record to indicate that he was anything other than a spectator, and the college president so found (R. 16a).

C. Summary of Evidence.

The college charges and evidence against petitioners do not involve violence, disruption, or destruction of college property (although college claims $600.00 damages through destruction of shrubbery and broken windows by other students, for which damages no charges have been filed against any student).

The college simply charges petitioners with participating in an unruly or unlawful mass gathering at a public intersection on the sole evidence (1) as to Esteban that he was on the sidewalk a half block from the intersection after the demonstration had broken up and the students were scattering back to their dormitories and momentarily refused to return to his dormitory, and (2) as to Roberds on the sole evidence that he was present as a spectator at the demonstrations.

REASONS FOR GRANTING THE WRIT

I. Direct Conflict Between Circuits.

The decisions of the Courts below in the instant case are directly in conflict with *Soglin* v. *Kauffman*, No. 17427 (Cir. 7, October 24, 1969), affirming the decision of District Judge Doyle, 295 F.Supp. 978.

The majority opinion of the Eighth Circuit in the instant case, 415 F.2d 1077, 1088-89, said:

> "we see little basically or constitutionally wrong with flexibility and reasonable breadth, rather than meticulous specificity, in college regulations relating to conduct. Certainly these regulations are not to be compared with the criminal statute. They are codes of general conduct which those qualified and experienced in the field have characterized not as punishment but as part of the educational process itself and as preferably to be expressed in general rather than specific terms. * * * We further agree that a school has latitude and discretion in its formulation of rules and regulations and of general standards of conduct * * * Our attention has been called to the fact that Judge Doyle in his recent opinion in *Soglin* v. *Kauffman*, 295 F.Supp. 978, 990-99 (W.D. Wisc. 1969), expresses disagreement with the observations of Judge Hunter on this aspect of the case. To the extent that Judge Doyle is in disagreement with Judge Hunter, we must respectfully disagree with Judge Doyle."

The Seventh Circuit, at slip opinion p. 7, said "To the extent that *Esteban* v. *Central Missouri State College*, 296 F.Supp. 622, 630, affirmed ..... F.2d ....., refuses to apply standards of vagueness and overbreadth required of universities by the Fourteenth Amendment we decline to follow it."

In Judge Doyle's decision at 295 F.Supp. 990, he said:

"Finally, then, the issue is reached whether admission to the University of Wisconsin as a student, and continued enrollment there, may be made to depend upon consent to a regime in which due process may be denied by vague prohibitory standards, or freedom of expression may be threatened or denied by vague or overly broad prohibitory standards. For the reasons I have discussed the answer must be no, unless there is some compelling reason why the university should escape this particular constitutional stricture, some reason why it should be wholly free to refrain from promulgating reasonably definite and narrow rules of conduct. In *Esteban* v. *Central Missouri State College*, 290 F.Supp. 622, 630 (W.D. Mo., W.D., 1968), it was said:

> 'Judicial notice is taken that outstanding educational authorities in the field of higher education believe, on the basis of experience, that detailed codes of prohibited student conduct are provocative and should not be employed in higher education. See, Brady and Snoxell, Student Personnel Work in Higher Education, p. 378 (Houghton-Mifflin, Boston, 1961). For this reason, general affirmative statements of what is expected of a student may be preferable in higher education. Such affirmative statements should, of course, be reasonably construed and applied in individual cases.'

I cannot agree that university students should be deprived of these significant constitutional protections on so slender a showing." (Emphasis added).

The two circuits are in clear disagreement as to whether the "void for vagueness and overbreadth" doctrine applies to student conduct regulations. Where, as here, first amendment rights are involved, the appropriateness of applying the doctrine is compelling. Expulsion or indeterminate suspension from college today may be a

more serious punishment than conviction under the criminal statutes for a comparable offense. The conflict should be resolved in favor of constitutional protection.

II. Important Questions of Federal Law Should Be Settled by This Court.

The current student ferment in college campuses, the re-examination of the doctrine of *in loco parentis* and the role of colleges in regulating social conduct, and the necessity for reaching viable solutions to the growing confrontations between student and administrators have reached the level of a major national concern almost equalling those over Vietnam and the problems of the cities. The courts little concerned themselves in this area until the Civil Rights movement in the South produced problems of academic freedom and due process which found their way into the federal courts beginning in about 1961 with *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir.). Since then the Courts have had a growing number of cases testing and reexamining the right of free speech and procedural and substantive due process. Along with the acts of violence (or despite them) there have been quiet reviews and dialogues which have moved our educational systems forward. It is of critical importance that college students realize that there are processes for reaching peaceful solutions to campus conflicts. It is equally important that college administrators learn the legal limits of their powers to control the lives of students. Regretfully the inevitable result of student resort to violent tactics has been the over-reaction of the administrators, which frequently has lumped peaceful and constitutionally protected conduct with illegal student activities, or has suppressed legitimate dissent or social unorthodoxy, in the unfounded fear that it necessarily imports or relates to disruptive conduct.

Colleges and Universities are badly in need of authoritative legal guides to acceptable student conduct and legitimate means for handling conduct exceeding the bounds of acceptable conduct.

The problems fall logically into the areas of rights of free speech and assembly under the First Amendment and substantive and procedural due process under the Fourteenth Amendment. Both areas are presented in the instant case.

This Court on August 13, 1969 agreed to hear *Jones* v. *Tennessee Board of Education*, 279 F.Supp. 190 (M.D. Tenn. 1968), aff'd 407 F.2d 834 (6th Cir. 1969), cert. granted 38 U.S. L. W. 3142 (U.S. Aug. 13, 1969) (No. 731). The questions presented in *Jones* include vagueness and overbreadth of college regulations as violative of the First and Fourteenth Amendments, denial of student's right of free speech by dismissal from college for handing out a leaflet and conviction on uncharged findings as denials of due process, all issues related to the questions presented by this petition.

III. Decision Below Is Believed to Be Erroneous.

A. College regulations and lower court's decision deny constitutional right of free speech and assembly.

The First Amendment is applicable to the states by reason of the Fourteenth Amendment. *Edwards* v. *South Carolina*, 372 U.S. 229, 235. The use of public places for purposes of assembly, communicating thoughts between citizens and discussing public questions has been consistently protected by the United States Supreme Court.

Both the college regulation and the lower court's ruling violate the First Amendment right of free speech and assembly in that they declare mere presence at the scene of

an unruly demonstration to be participation in the disturbance.

The college hearings were based on charges, both predicated solely on "contributing to and participating in an unruly and unlawful mass gathering." These charges are based on the college regulation then in effect:

> "Participation in mass gatherings which might be considered as unruly or unlawful will subject a student to possible immediate dismissal from the College. Only a few students intentionally get involved in mob misconduct, but many so-called 'spectators' get drawn into a fracas and by their very presence contribute to the dimensions of the problems. It should be understood that the College considers no student to be immune from due process of law enforcement when he is in violation as an individual or as a member of a crowd." (290 F.Supp. 626) (R. 4a, 5a).

Roberds was merely a spectator at the scene of the gathering, nothing more (R. 5a). Esteban was in the dormitory all during the episode and came down to the sidewalk in front of the dorm where he was talking with friends and was never closer than about half a block of the scene of the gathering (R. 6a-8a). As applied to these students the regulation clearly is a restraint on constitutionally protected rights of free speech and peaceful assembly.

The First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press, or to peacefully assemble". It must be taken as a command of the broadest scope that explicit language read in the context of a liberty loving society will allow. *Bridges* v. *California*, 314 U.S. 252, 263; *Schneider* v. *State*, 308 U.S. 147. As worded and even further as construed by the president the student regulation is a clear and prior restraint on these rights. *Speiser* v. *Randall*, 357 U.S. 513; *First Unitarian Church* v. *Los Angeles County*, 357

U.S. 545; *Hammond* v. *South Carolina State College*, 272 F.Supp. 947.

In *Dickey* v. *Alabama State Board of Education*, 273 F.Supp. 613 (1967), the District Court said (l.c. 617):

> "It is basic in our law in this country that the privilege to communicate concerning a matter of public interest is embraced in the First Amendment right relating to freedom of speech and is constitutionally protected against infringement by state officials. The Fourteenth Amendment to the Constitution protects these First Amendment rights from state infringement, *Thornhill* v. *State of Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, and these First Amendment rights extend to school children and students insofar as unreasonable rules are concerned. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628. Boards of education, presidents of colleges, and faculty advisers are not excepted from the rule that protects students against unreasonable rules and regulations."

Hammond, Dickey and *Barnette* all involve school regulations, not city ordinances or state statutes.

These students were engaged in peaceful activities, i.e. standing on the public sidewalk. Such conduct is comparable to the rights protected by the U. S. Supreme Court in *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), where peaceful picketing in a large shopping center complex was held within the freedom of assembly and *Marsh* v. *Alabama*, 326 U.S. 501 (1946), where a privately owned "company town" was held subject to the First Amendment. A college community (and particularly the public side walk) is certainly at least as appropriate a setting for the exercise of First Amendment rights as a shopping center or "company town".

In *Hunter, et al.* v. *Allen*, 286 F.Supp. 830, 836-9 (D.C. Ga.), the court held city ordinances invalid for impinging on freedom of assembly which punished "any person who shall collect in bodies or in crowds for unlawful purposes as defined by the current ordinances of the City of Atlanta". The court said these sections "as presently drawn impinge on freedom of assembly. This for the reason that they omit the commission of some overt act. . . . The court is constrained to believe that the First Amendment permits assembly even for unlawful purposes so long as it is limited to a peaceful discussion of such purpose. These sections do not punish the exhortation, encouragement or commission of preparatory acts leading toward a violation of law . . . but punish the assembly itself."

In *Landry* v. *Daley*, 280 F.Supp. 938 (D.C. Ill. 1968), the Illinois Mob Action Statute provision that "mob action" consists of the assembly of two or more persons to do an "unlawful act" is invalid because it suppresses free speech and assembly in violation of the First Amendment *and* because it is so impermissibly vague and overbroad as to deny due process.

Rollins v. *Shannon*, 292 F.Supp. 580 (D.C.E.D.Mo. 1968) holds that mere presence at an unlawful assembly does not render one liable under a statute prohibiting unlawful assembly, but one must intend to and actually participate in the unlawful acts. In *Ex parte Coder*, 44 S.W.2d 179 (K.C.C.A.Mo.), the court held that to constitute unlawful assembly there must be an intent to do an unlawful act or after being assembled the parties must agree mutually to assist one another to do an unlawful act with force and violence.

As pointed out in *Terminiello* v. *Chicago*, (1949) 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131, even though the conduct of other persons is violent there must be some show-

ing that the accused stirred people to anger by saying something unlawful. Here there is nothing whatsoever to indicate that Esteban or Roberds even were involved in any organized activity, much less that they incited action of any kind, lawful or unlawful. There is simply no evidence before the trial court to establish that either Roberds or Esteban had any involvement in planning, organizing, or combining with any other persons to engage in any unlawful conduct. It is further clear that there is no evidence that they engaged in any unlawful conduct. If the college regulation relative to "unruly or unlawful gatherings" is to be given the broad interpretation proposed by the college one could never step out of his house to attend any type of a meeting or to observe a crowd gathering whether it be for a fire, a car accident, a fist fight or whatever it might prove to be.

The law has clearly been stated in other jurisdictions that where a lawful assembly degenerates into an unlawful one, and unlawful acts are committed, *only those who participate in the unlawful acts are guilty of the offense*; *Lair* v. *State of Oklahoma*, 316 P.2d 225, 71 A.L.R. 2d 856; *People* v. *Most*, 128 N.Y. 108, 27 N.E. 970, 972; Wise on Riots and Unlawful Assembly, 4th Ed., p. 36.

Students involved in peaceful aspects of demonstrations have been held not responsible for the disruptive or destructive acts of others, where they did not organize, incite or participate in the violence. *Scoggins* v. *Lincoln University*, 291 F.Supp. 161, 169; *Zanders* v. *Louisiana Board of Education*, 281 F.Supp. 747, 769 (D.C.La. 1968); *Barker* v. *Hardway*, 283 F.Supp. 228 (1968). If the courts are to encourage peaceful solutions of student-administration conflicts certainly they should clearly differentiate between the non-violent and the violent actors.

No legal or actual inference of participation in the unlawful aspects of the student activities can be drawn from mere presence. Any such inference denies due process. *United States* v. *Romano*, 382 U.S. 136, 15 L.Ed.2d 210, 213, 86 S.Ct. 279; *Bozza* v. *U. S.*, 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818.

Circuit Judge Lay in his dissenting opinion in the court below said:

> "mere presence at a demonstration is not and cannot be the basis for university regulations which attempt by 'prior restraint' to prevent demonstration itself. Nor can it be the basis for state exclusion from the educational opportunity." (Appendix A55).

B. Student conduct regulations are vague and overbroad.

(1) Vagueness.

(a) "Void for vagueness" doctrine applies to college regulations.

There is no constitutional argument for denying or limiting the protections of college students in free speech and due process areas as opposed to the rights of other citizens. The drafting of clear and specific college rules is not a burden so heavy as to be shucked off with the simplistic argument that it is too great a burden on the educational system. Any such argument is answered by the doctrine of *Gault*, which points out that the law must not give young people "the worst of both worlds." If the purpose of clear rules is to inform in advance and give guidelines for proper conduct, young people should be afforded at least the same clarity by which to conduct themselves. If the purpose of clarity is to give guidelines for determining whether wrongdoing has occurred, college

administrators or lay tribunals (untrained in the law) are more in need of clear rules to govern the fairness and justice of their determinations than are courts of law. One of the fundamental teachings of youth guidance is that young people should be told clearly what is right and what is wrong, as well as the consequences of their acts.

William F. Buckley v. *John J. Meng, President of Hunter College,* 230 N.Y.S.2d 924, held that regulations governing use of facilities of a New York city college which provide that in order to qualify, a program must be "determined to be compatible with the aims" of the college, are unconstitutionally vague and invalid.

In *Dickson* v. *Sitterson,* 280 F.Supp. 486, 498 (M.D.N.C. 1968), after discussing the statutes in terms of "void for vagueness" the Court said (l.c. 498):

> "The statement of policy and the procedures and *regulations adopted by the Board* of Trustees suffer from the same infirmities. In order to withstand constitutional attack they must impose a purely ministerial duty upon the person charged with approving or disapproving an invitation to a speaker falling within the statutory classifications, *or contain standards sufficiently detailed to define the bounds of discretion.*" (Italics added).

Both *Barker* v. *Hardway,* 283 F.Supp. 228, 233 (1968), and *Hammond* v. *South Carolina State College,* 272 F.Supp. 947, extended constitutional safeguards to college regulations. *Barker* is significant in holding that the conduct of the individual charged, not the group is controlling.

In *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), the Supreme Court denied a school board the right to hide behind a vague school disciplinary standard ("detrimental to the operation of the school"). In *Keyishian,*

infra, the recent loyalty oath case, the Supreme Court took into consideration the administrative regulation as well as the statute. In *Ashton* v. *Kentucky*, 384 U.S. 195, 16 L.Ed.2d 469, 86 S.Ct. 1407, the court said:

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer".

(b) Regulations are void for vagueness.

The college regulation under which students were charged violates the First and Fourteenth Amendments, both on its face and as applied to these students in that its language is vague, uncertain and overbroad, providing students with no reasonable standard for observance and no notice of illegal conduct, and failing to provide sufficiently precise standards to guide the disciplinary authority in determining if a violation occurred. As applied by the lower Courts and the college president the regulation was so interpreted as to be beyond any reasonable standard for observance and notice of misconduct. The Supreme Court has ruled on the "void for vagueness" question. *Zwicker* v. *Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967). In *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926), the doctrine is stated as follows:

> ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process. . ."

In *A. B. Small* v. *American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925), the Court extended this requirement of due process to non-criminal prosecutions.

Here the College hearing is a civil proceeding "in the nature of a criminal proceeding." See *In re Gault*, 387 U.S. 1 (1967) (juvenile court proceedings); and *Mempa* v. *Rhay*, 36 U.S.L.W. 4009 (Nov. 14, 1967) (probation revocation hearings). The College is therefore held to the standards of due process required by the Constitution.

The vagueness doctrine has been applied most recently by the Supreme Court in the loyalty oath cases to strike down regulations even though no criminal sanctions could result, where the effect was to suppress speech. *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 87 S.Ct. 675; *Whitehall* v. *Elkins*, 389 U.S. 54 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966).

The word "unlawful" in the regulation is nothing but a legal conclusion.

In *Baker* v. *Bindner*, 274 F.Supp. 658 (1967), statutes and ordinances prohibiting "counseling an unlawful act" were held constitutionally overbroad and vague, capable of sweeping and improper application.

In *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-3, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), the court said:

> "For standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

We are also faced with the overbroad and vague meaning of "unruly". Is this speech, physical violence, noise or what? In *Baker*, supra, the district court held unconstitutional a statute making it illegal to "band together . . . for the purpose of . . . disturbing any person", pointing out that its language did not limit it to violent conduct and appeared to include acts of speech and was susceptible of

being read to include acts of peaceful assembly. Similarly in *Terminiello,* supra, 337 U.S. at page 4, the Supreme Court said:

> "It (speech) may indeed serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

Again in *Baker* supra, the court knocked out city vagrancy ordinances, involving "loitering" or "disorderly conduct", without adequate statutory definition or clarification of the terms, saying "It does not give fair notice, it is arbitrary as to its standard and is grossly susceptible of overreaching federal constitutional guarantees by lending itself for ready use by officials against those deemed to merit their displeasure."

The regulation itself specifies that "spectators" are in violation. So worded it would seem to encompass persons walking by, merely observing, or otherwise innocently present and in no wise involved in any improper conduct.

No law or regulation can make lawful conduct into unlawful. How does a spectator become at fault? Does he know whether a peaceful march will change to violence or continue peaceful? Can he know or assume that illegal activities will occur? And if they do, how does he become implicated? How does one who comes upon a scene determine he should leave or be guilty of some unknown and yet to be performed act of law violation? What standard or yard stick does such a law provide? Clearly none which can supercede the clear and forceful mandate of the First Amendment that one may peacefully speak, associate and assemble.

Next consider the words of the regulation "which might be considered (as unruly, etc.)". Again we find

vague and uncertain language, incapable of establishing a standard for administrative determination. "Considered" by whom? By the Dean? The College President? The city police? A Court of Law? The inability of any student to apply a standard of conduct under this regulation has a strong "chilling" effect on the exercise of First Amendment rights. The words "might be considered" give unlimited and unbridled discretion. There is no statutory or regulatory definition to clarify the meaning. A similar standard was struck down in *Baker* v. *Bindner*, 274 F.Supp. 658, in passing on a "loitering" ordinance. The court said:

> "To us it appears overbroad and vague. We do not believe that the requirement that an offender 'give a satisfactory account of himself' passes constitutional tests. It places sole determination in the discretion of the policeman on the beat. * * * Such unbridled discretion cannot be constitutionally vested in the policeman or the court."

City ordinances and state statutes which seek to control parades and assemblages have been held unconstitutionally vague and overbroad where standards are not set out to guide the discretion of the administrator. See *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Carmichael* v. *Allen*, 267 F.Supp. 985; *Snyder* v. *Board of Trustees*, 286 F.Supp. 927 (N.D.Ill. 1968); *Hunter* v. *Allen*, 286 F.Supp. 830.

The objections to vague college regulations are well stated in *Soglin* v. *Kauffman*, 295 F.Supp. 978, 993 (D.C. Wisc. 1968). In one aspect of that case Judge Doyle was concerned with regulations of the University of Wisconsin comparable in character with the instant "unruly and unlawful mass gathering" rule. There the regulation permitted students to "support causes by lawful means which do not disrupt the operations of the university. . . .". Judge Doyle said:

"But the view I have taken, expressed in the preceding section of this opinion, such vagueness or overbreadth, or both, are impermissible in the First Amendment area when the potential of serious disciplinary sanctions exists. When the standards of vagueness and overbreadth are applied to Chapter 11.02, however mildly, I am obliged to find it invalid. Neither the element of intention, nor that of proximity of cause and effect, nor that of substantiality, for example, is dealt with by its language. Nor does it contain even the most general description of the kinds of conduct which might be considered disruptive of the operations of the university, nor does it undertake to draw any distinctions whatever as among the various categories of university 'operations'.

I conclude that Chapter 11.02 is unconstitutionally vague.

Assuming, again with difficulty as was true with respect to 'misconduct' as a standard, that the term 'lawful means which do not disrupt the operations of the university' is sufficiently definite to avoid the vice of vagueness, I conclude that it is overly broad. As explained above (at pages 7-8), when the end can be more narrowly achieved, it is not permissible to sweep within the scope of a prohibition activities that are constitutionally protected free speech and assembly. And one may attack such an overly broad prohibition although his own conduct may have been constitutionally punishable had the rule been more narrowly drawn. In such a situation, 'possible applications of the (rule) in other factual contexts beyond that at bar' may be taken into account in appraising the rule's inhibitory effect upon First Amendment freedoms. *NAACP* v. *Button*, 371 U.S. 415, 432."

(2) The regulations are also void for overbreadth.

The regulations are also overbroad and sweeping, and therefore potentially prohibit conduct protected by the

First and Fourteenth Amendments. The essential import of this challenge is that the regulations are so overbroad and sweeping that they effectively stifle exercise of First Amendment rights by students. A student must act overly cautiously, to prevent his conduct from becoming subject to discipline. From the perspective of the student of common intelligence, the regulations in their complexity and vagueness, must necessarily leave him guessing at the rule's meaning and differing as to its application. Such a situation was clearly disapproved by the Supreme Court in *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), where the Court held that the University of Washington Loyalty Oath was unconstitutional on the ground, *inter alia*, that it permitted punishment of the fair use of First Amendment opportunities.

The weakness of the "mass gathering" regulation in this respect is the lack of standards as to "participating in" and "unruly". The chilling effect of such language, as applied by the college is clear and dangerous. Any student attending any meeting, protest or demonstration runs the risk that the meeting will become too large, unruly or involve some forbidden activity on the part of others who attend. Mere "presence" has become involvement in all resulting events. Clearly the regulation says that those students who attend any demonstration may easily be in trouble. The smart student had better stay in the dormitory and avoid football games as well as mass meetings (Who did steal the goal posts? It makes no difference. You were there—guilty).

It makes little difference if the scheme of regulation of conduct and utterances in the area of freedom of expression is vague and sweeping from its complex or simply vague nature. (See, *Keyishian* v. *Board of Regents*, 87 S.Ct. 675 (1967) (Fineberg Law held unconstitutional as

so complicated and intricate that one must guess as to application and steer far wider of the unlawful zone); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) (reestablishing that pertinent statutes provided a chilling effect on the exercise of First Amendment rights, by overbreadth, as they were susceptible of sweeping and improper application). What in essence is required to regulate conduct and utterances is a narrow specificity which provides sufficient certainty as to the meaning of the rule, and built-in standards and guidelines to guide the enforcement of the rule and prevent is improper application.

The College regulations fail to provide the requisite narrow specificity, lack certainty in meaning and lack standards and guidelines for application. There are no built-in limitations on the discretion of a disciplinary committee. What it may see fit to label as "unruly" or "unbefitting" may be constitutionally permissible expression of free speech. Disciplinary committee members are without standards or guidelines. Without such instruction, decision is a function of the character of the administrator in question, and may consequently be arbitrary or capricious.

In question is not the particular conduct of the accused, but whether or not the rule stifles the free exercise of First Amendment freedoms, because it is susceptible to sweeping and improper application. If a person does not know what acts are *not* to be done he is likely to be constrained or "chilled" in his choice of action. "The threat of sanctions may deter almost as potentially as the actual application of sanctions . . . The danger of that chilling effect upon the vital First Amendment rights must be guarded against by sensitive tools which clearly inform . . . citizens what is being sanctioned." *Keyishian* v. *Board of Regents*, 87 S.Ct. 675, 684 (1967).

Although the charges against these students follow the language of the "mass demonstration" regulation and it is clear that that regulation was the basis for the college president's findings, the Court of Appeals, in the case of Esteban, also relies on the general conduct regulation, i.e., "Conduct unbefitting a student which reflects adversely upon himself or the institution." This regulation is even more clearly subject to the attack of vagueness and overbreadth. The college might just as well have ordered the student not to sin.

In *Soglin* v. *Kauffman*, No. 17427, October 24, 1969, the Seventh Circuit said (slip opinion, pp. 6-7):

> Having specifically charged the students with the offense of "misconduct", the University may not now claim that misconduct was not employed as a standard. When tested as such, however, the term is clearly inadquate in view of constitutional requirements.
>
> * * *
>
> The use of "misconduct" as a standard in imposing the penalties threatened here must therefore fall for vagueness. The inadequacy of the rule is apparent on its face. It contains no clues which could assist a student, an administrator or a reviewing judge in determining whether conduct not transgressing statutes is susceptible to punishment by the University as "misconduct." Since the misconduct standard is invalid on its face, it was unnecessary for the district court to make any findings with respect to plaintiffs' activities on October 18, 1967. Cf. *Hammond* v. *South Carolina State College*, 272 F.Supp. 947, 950 (D.S.C. 1967). To the extent that *Esteban* v. *Central Missouri State College*, 296 F.Supp. 622, 630 (W.D. Mo. 1968) affirmed, ... F.2d ..... (8th Cir. 1969), refuses to apply standards of vagueness and overbreadth required of universities by the Fourteenth Amendment we decline to follow it.

It is not an adequate answer to contend, as do defendants, that the particular conduct which is the object of university discipline might have violated an applicable state or local law or otherwise merited punishment. The issue here is not the character of the student behavior but the validity of the administrative sanctions. Criminal laws carry their own definitions and penalties and are not enacted to enable a university to suspend or expel the wrongdoer absent a breach of a university's own rule. Nor is "misconduct" necessarily confined to disruptive actions covered by criminal codes. The ability to punish "misconduct" *per se* affords no safeguard against the imposition of disciplinary proceedings overreaching permissible limits and penalizing activities which are free from any taint of impropriety. Hence we feel compelled to strike down the University's reliance on the doctrine of misconduct in order to ensure that "reasonable regulation of speech-connected activities [of students remains confined to] carefully restricted circumstances." *Tinker* v. *Des Moines School District*, 393 U.S. 503, 513.

(3) Students may attack regulations regardless of own particular conduct.

As stated in *Soglin* v. *Kauffman*, supra "the issue here is not the character of the student behavior but the validity of the administrative sanctions" (No. 17427, Cir. 7, slip opinion p. 7). And as District Judge Doyle said, 295 F. Supp. 993, "one may attack such overly broad prohibition though his own conduct may have been constitutionally punishable had the rule been more narrowly drawn", citing *NAACP* v. *Button*, 371 U.S. 415, 432.

C. Constitutional substantive due process requires substantial evidence to support disciplinary action against the students.

Roberds was charged with "contributing to and participating in an unruly and unlawful mass demonstration"

by allegedly writing his state representative evidencing his intention, advising the Dean of his intention, and thereafter contributing to and participating in a mass gathering. (290 F.Supp. 625) (R. 3a). The letter to his representative (R. 10a) *does not* support intent to participate in "an unruly demonstration". Nor can intent alone constitute "participation". Yet the college president's findings viewed the letter as evidence of a violation of the regulation. (R. 18a). Dean Chalquist specifically testified that "He did not say that he intended to do so (participate in a demonstration)" (290 F.Supp. 627, footnote 5). On the third element of the charge the college president found that Roberds "has repeatedly admitted attending the demonstrations on both nights but qualifies his attendance as being that of a spectator *and the evidence does not show otherwise.*" (Italics added). The president then held that mere presence was a violation of the regulation. (R. 16a).

The college had no right to deny Roberds the right to peacefully assemble, as a spectator. He was not an organizer, ringleader, inciter, or otherwise involved in the actual disturbance, he merely sat on the sidewalk, watching, nor was he unruly or rowdy in any way. (R. 5a, 16a-18a).

The charge against Esteban was contributing to and participating in an unruly and unlawful mass gathering, by resisting efforts of Dr. Meverden in dispersing the mass gathering, by failing and refusing to identify himself to Dr. Meverden, and by using vile and obscene language towards and threatening a resident assistant. (R. 3a).

The evidence is that Esteban was not involved in the demonstration nor was he at the demonstration; he was studying in the dormitory during the demonstration; he was standing at the corner of his dormitory, a half block

from the demonstration, peacefully talking to four or five other students when accosted by Mr. Meverden, after the mass gathering had broken up; and there was no college rule which gave Meverden authority to order Esteban into the dormitory or required Esteban to comply. (R. 6a-8a).

The college president's findings held:

> ". . . that this student's resistance to Dr. Meverden's efforts directed towards dispersing the demonstration contributed to the unruly and disorderly situation resulting from the demonstration and unquestionably constituted participation in the mass gatherings even though at the specific time of the occurrence the gathering was in the process of being dispersed." (R. 14a-15a).

This finding is clearly erroneous in fact and in law. The finding attempts to make acts unrelated to and after the demonstration a part thereof. There is no evidence connecting Esteban with any aspect of the demonstration, either peaceful or violent. He wasn't even a spectator.

Since Esteban was not involved in the demonstration, nor was he at the scene of the demonstration, there is no basis for the finding that Meverden's actions toward Esteban constituted any effort to disperse the demonstration.

One cannot help being distressed at the total implications of this episode. How did Esteban get involved? The chain of events started with an unauthorized direction from Meverden, which in fact Esteban, though protesting, complied with. He was actually suspended for two semesters for a single vulgar sentence toward a fellow student and for impulsively kicking over a wastebasket!

A finding not based on any evidence is a denial of substantive due process in violation of the Fifth and Fourteenth Amendments. The Supreme Court held in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), that it is constitutionally impermissible to allow prosecution to proceed where arrests are made under overbroad statutes regulating freedom of expression or under constitutional statutes *invoked with no evidence of their violation*, where the purpose or effect of such arrests and prosecution is to deter the exercise of First Amendment rights. The presumption of innocence, which must be overcome by substantial evidence, is an essential ingredient of due process of law. *U.S.A.* v. *Commonwealth of Pennsylvania*, 273 F.Supp. 923, 926 (1967). Merely because other persons are provoked to violence is no basis for punishing quiet and peaceful conduct. See *Barr* v. *Columbia*, 378 U.S. 146, 12 L.Ed.2d 766, 769, 84 S.Ct. 1734.

Substantive due process contemplates the need for specificity in rules and standards of conduct and the requirement that the finding of guilt not be based upon an evidentiary void, i.e. that there be some evidence of guilt.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING ACHTENBERG
531 Walnut
Kansas City, Missouri 64106
Counsel for Petitioners

December 31, 1969.

APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ALFREDO ESTEBAN, by his mother and next friend, GUADALOUPE P. ESTEBAN, 1919 Monroe Avenue, Kansas City, Missouri, and,
STEVE CRAIG ROBERDS, by his father and next friend, JAMES ROBERDS, 2724 Sims Avenue, Overland, Missouri,

Plaintiffs,

vs.

CENTRAL MISSOURI STATE COLLEGE, Warrensburg, Missouri, WARREN C. LOVINGER, President of Central Missouri State College, Warrensburg, Missouri, and W. LESTER SIMPSON, President and JOE HERNDON, LELAND J. CULP, VIRGINIA GOTTLIEB, BYRON CONSTANCE, and J. N. CUNNINGHAM, members of the Board of Regents of Central Missouri State College, Warrensburg, Missouri,

Defendants.

No. 16852-4

Opinion

(Filed September 25, 1968)

Plaintiffs were students at Central Missouri State College, Warrensburg, Missouri, until March 31, 1967, when by order of defendant Warren C. Lovinger, presi-

dent of the college, they were suspended for two semesters, with the right thereafter to apply for readmission. Plaintiffs filed a complaint in this Court charging, among other things, that they had been suspended without proper notice and hearing and in violation of their constitutional right to procedural and substantive due process. After a trial on September 6-7, 1967, this Court directed that they be given a new hearing. For the details, see Esteban v. Central Missouri State College, 277 F. Supp. 649.

Pursuant to the Court's direction, on October 18, 1967, written charges and notice of hearing were served on plaintiffs by the college. The new hearing occurred on November 3, 1967, with the result that the previous suspensions were reaffirmed. Plaintiffs then filed their present complaint.[1]

Plaintiffs claim the reaffirmed suspensions are tantamount to expulsion and are invalid because:

(1) The college regulation with regard to mass gatherings violates the first amendment guarantee of freedom of speech and assembly.

(2) The college regulation with regard to participating in mass demonstrations violates the first and fifth amendments in that its language is vague, uncertain and overbroad, providing plaintiffs with no reasonable standard for observance and no notice of illegal conduct.

(3) The enforcement of the mentioned regulation as to off campus conduct is beyond the powers of the college and is a denial of due process.

(4) The charge as originally made did not contain the words "contributing to" which quoted lan-

1. Plaintiffs invoke jurisdiction under the first and fourteenth amendments, United States Constitution, Title 28, U.S.C. §§ 1331 and 1343, and Title 42, U.S.C. §§ 1981 and 1983 (Civil Rights).

guage is not a part of the regulation and hence is unenforceable.

(5) The hearing before Dr. Lovinger lacked procedural due process as required by the fourteenth amendment in that there was no evidence to support a charge of participating in an unruly or unlawful mass demonstration.

Plaintiffs request this Court to declare the college regulation to be void; to enjoin its enforcement; to set aside this suspension; to expunge all mention of their suspension from their college record; and to permit them to reenter the college in good standing.

Defendants strongly deny all plaintiffs' claims. Defendants plead res judicata and mootness, citing the earlier decision which was not appealed, and noting that the condition of the suspension was that plaintiffs were not eligible to reapply for two semesters which have now passed. Defendants also assert this Court should abstain from all action herein until and unless there is a full exhaustion of state court remedies by plaintiffs.

On August 16, 1968, the case was fully tried to the Court on the issues presented. Discussion and disposition of mentioned issues and the varying contentions of the parties are necessary.

November 3, 1968 College Hearing:

A summary of the substance of the evidence presented to Dr. Lovinger in the November 3, 1967 hearing is desirable prior to discussing the issues. The charges related to Mr. Esteban's and Mr. Roberd's activities in connection with mass student demonstrations occurring the evenings of March 29, and March 30, 1967.[1] These demonstrations

1. The written charge against Esteban read: "You are hereby notified that you are charged with contributing to and participating in an unruly and unlawful mass gathering occurring

took place at the intersection of the public street adjacent to the school campus and State Highway 13 and overflowed onto the sidewalks and campus.[2] On the evening of March 29. some 350 students were present in the mass and on March 30, there were some 600 students included. As a partial result of these two mass demonstrations there was in excess of $600 damages and destruction of college property, including broken school building windows and destroyed shrubbery; eggs were thrown; the Dean of Men, Dr. Chalquist, was hanged in effigy, his "dummy" torn up and set on fire; traffic was halted and blocked, cars were rocked, and their occupants ordered out into the street. The college president directed a number of his personnel, including Dr. Meverden, to go to the scene to restore order.

ESTEBAN EVENT:

Introduced at the November 3rd, 1967 hearing was Mr. Esteban's testimony to the following effect: He was on scholastic probation and only a short time previously had

---

on the 30th day of March, 1967, at and near Central Missouri State College in that you, the said Alfredo Esteban, did resist efforts of one Dr. M. L. Meverden in dispersing said mass gathering, failed and refused to identify yourself to Dr. Meverden as requested and used vile and obscene language towards and threatened a resident assistant of the College at Foster-Knox Hall."

The written charge against Roberds read: "You are hereby notified that you are charged with contributing to and participating in an unruly and unlawful mass gathering occurring on or about the 29th and 30th days of March, 1967 at and near Central Missouri State College in that you, the said Stephen Craig Roberds, on the 5th day of February, 1967 directed correspondence to Mr. E. J. Cantrell of the Missouri Legislature evidencing your intention to participate in such mass gathering, did thereafter advise Dean Hollis Chalquist, Dean of Men, of your intention to participate in such demonstration at which time you were specifically advised that such participation would result in immediate suspension from Central Missouri State College and that you did thereafter continue to contribute to and participate in said mass gathering all of which actions were in violation of the terms and provisions of your disciplinary probation."

2. Dr. Lovinger termed them "a riot which blocked traffic on a state highway which caused considerable damage on the campus which had the citizens of Warrensburg very much worried with all the noise and turmoil that was caused."

been terminated from disciplinary probation over a knife cutting incident with a fellow student. The evening of March 29, 1967, around 11:30 p.m., he left his dormitory about the time the "disturbance" had subsided. Some of the students were proceeding along the street from the mass demonstration to their dormitories. Esteban proceeded down the sidewalk to within about 100 feet of the intersection of the scene of the mass demonstration and stayed there awhile. Dr. Meverden, a faculty member, who was seeking to disperse students standing outside their dorms, approached Esteban and asked him to go inside the dormitory. Instead of complying, Esteban asked why, and on again being requested to go in, again asked why. He told Dr. Meverden that he was not in violation of any state, county, or federal law and that he had a right to be out there. Dr. Meverden asked for his student identification card which by college regulation he was required to have in his possession at all times. Esteban said ("in rough words" according to one witness) he did not have it. Nor did he give his name. Dr. Meverden again requested him to go in the dormitory and get off the street. Esteban argued with Dr. Meverden and questioned his authority, saying there were no rules limiting the time men could stay outside the dorms. Shortly, and with the encouragement of other students present, he went into the dormitory. Dr. Meverden also went in and asked Gerald Haddock, the resident assistant of Esteban's dormitory, who Esteban was. Haddock was overheard by Esteban telling Dr. Meverden Esteban's name. Esteban, as Dr. Meverden was leaving, called Haddock a prick and a bastard and told him he "would not be around here very long." According to Esteban's roommate, Esteban then angrily picked up a waste can and emptied the contents on the floor at the feet of Haddock.

ROBERDS EVENT:

Prior to the mass demonstrations, Roberds had been placed on disciplinary probation and furnished a written statement of the terms of that probation. Dean Chalquist also orally explained those terms to him. He and Dean Chalquist conversed relative to his intention to participate in a demonstration.[1] Roberds asked about the possible repercussions of his involvement in (future) demonstrations or disturbances. He was advised "that any action on your part which may reflect unfavorably upon either you or the institution can be considered grounds for suspension."[2] Roberds, under date of February 5, 1967, wrote E.

---

1. The pertinent college regulations mainly involved read: "The conduct of the individual student is an important indication of character and future usefulness in life. It is therefore important that each student maintain the highest standards of integrity, honesty and morality. All students are expected to conform to ordinary and accepted social customs and to conduct themselves at all time and in all places in a manner befitting a student of Central Missouri State College.

"All students that enroll at C.M.S.C. assume an obligation to abide by the rules and regulations of the college as well as all local, state and federal laws.

"When a breach of regulations involves a mixed group, ALL MEMBERS ARE HELD EQUALLY RESPONSIBLE.

"Conduct unbefitting a student which reflects adversely upon himself or the institution will result in disciplinary action."

"Mass Gatherings—Participation in mass gatherings which might be considered as unruly or unlawful will subject a student to possible immediate dismissal from the College. Only a few students intentionally get involved in mob misconduct, but many so-called 'spectators' get drawn into a fracas and by their very presence contribute to the dimensions of the problems. It should be understood that the College considers no student to be immune from due process of law enforcement when he is in violation as an individual or as a member of a crowd."

2. Dr. Chalquist testified:

"A question was raised concerning what action might be taken against him if he were to become involved in a disturbance or demonstration.

Mr. Wesner: And how did that come about? Who brought that up?

Dr. Chalquist: Mr. Roberds brought that question up.

J. Cantrell, a Representative from his county in the Missouri Legislature, the following letter:

> "* * * I assure you, I do not stand alone in my disgust with this institution. From suppression of speech and expression to ridiculous, trivial regulations this college has done more to discourage democratic belief than any of the world's tyrants. * * * My comrades and I plan on turning this school into a Berkeley if something isn't done."

Throughout both evenings of the mass demonstrations Roberds was present as a part of the crowd. On March 29, 1967, he arrived at the scene of the demonstration about 10:15 p.m. and returned to his dormitory about 10:45 p.m. On March 30, 1967, he arrived at the scene about 9:30 p.m. and remained until about 10:30 p.m. During the first night, while a part of the gathered crowd, he talked to students who were present in it. Roberds testified that the second evening, also while a part of the crowd at the demonstration, that "I discussed some of the things that were going on, the rocking of the cars and the dummy. At that time I mentioned my disgust with the college, and we talked, as the people I had talked to had

---

Mr. Wesner: And did you, as Dean of Men, advise Mr. Roberds what action would or might be taken in the event he might become involved.

Dr. Chalquist: I did.

Mr. Wesner: Did Mr. Roberds specifically state to you that he intended to participate in a demonstration?

Dr. Chalquist: No, he did not. He did not say that he intended to do so.

Mr. Wesner: As I understand you, he merely asked you what action would be taken against him if he did so, is that right?

Dr. Chalquist: Yes, sir.

Mr. Wesner: And what action did you tell him would be taken?

Dr. Chalquist: I told him that according to the terms and conditions under which he had been placed on disciplinary probation, that his continued existence or association with the College would be in jeopardy. In other words, there was a possibility that he could be suspended for such involvement."

the same feeling." He saw the dummy brought to the scene of the demonstration; saw it hung, torn up and burned by students in the crowd. He saw the cars approached by the students, saw the cars rocked, saw the attempts to take the occupants out of the cars. He returned to his dormitory after the dispersal of the gathering. He stated he was at the demonstrations each evening simply as a "spectator", not participating in any of the acts of violence or destruction.

Prior to directly disposing of the various issues and contentions it is helpful to set out certain pertinent fundamentals that may be generally involved.

Question of Jurisdiction:

Under Sections 1343(3), Title 28, and 1983, Title 42, U.S.C., and also in appropriate cases under Sections 2201 and 1331(a), Title 28, U.S.C., United States District Courts have jurisdiction to entertain and determine actions by students who claim unreasonably discriminatory, arbitrary or capricious actions lacking in due process and depriving a student of admission to or continued attendance at tax supported institutions of higher learning. The instant case was brought specifically as a Section 1983 case in equity and the Court has jurisdiction

Question of Exhaustion of Remedies:

Counsel for defendants strongly urges that federal courts may not and should not proceed in this kind of case until all state remedies have been first exhausted. However, it is the law that in an action in equity or law under Section 1983, Title 42, U.S.C. the doctrine of exhaustion of state judicial remedies is not applicable. The fact that there is an existing state judicial remedy for the alleged wrong is normally no ground for stay or dismissal. Monroe

v. Pape, 365 U.S. 167 (1961), Damico v. California, 389 U.S. 416 (1967), McNeese v. Board of Education, 373 U.S. 668 (1963).

Question of Exhaustion of Institutional Processes:

Ordinarily until the currently available institutional processes have been exhausted, the disciplinary action is not final and the controversy is not ripe for determination. Under the facts presented in the instant case it is apparent that there has been an exhaustion of available institutional processes.

Question of Mootness:

In an action at law or equity under Section 1983, Title 42, U.S.C. to review severe disciplinary action, such as the instant case involving lengthy suspension and a concomitant adverse school record with continuing adverse effect on the student involved, the doctrine of mootness is not applicable when the action is timely filed. Cf. Carafas v. LaValle, 391 U.S. 234 (1968), overruling Parker v. Ellis, 362 U.S. 574 (1960), and Sibron v. New York, 392 U.S. 40 (1968), qualifying St. Pierre v. United States, 319 U.S. 41, (1943).

Question of Res Judicata:

The earlier Esteban case ordered that plaintiffs be given written charges, a new notice and a hearing. Plaintiffs' present contentions concern matters neither presented, decided by, nor necessary to that decision. They are not barred by the doctrine of res judicata. See, 30A. Am. Jur. Judgments, Section 374 and cases there cited.

Question of Scope of Section 1983:

In an action under Section 1983, the issues to be determined will be limited to the determination of whether,

under color of any statute, ordinance, regulation, custom or usage of a state (i.e. "state action") a student has been deprived of any rights, privileges or immunities (of which he complains) secured by the Constitution and laws of the United States.

Question of "State Action":

Disciplinary action by any institution, institutional agency, or office ordinarily will be deemed to be under color of a statute, ordinance, regulation, custom or usage of a state—i.e. "state action" within the meaning of Section 1983, Title 42, U.S.C. The action of the college in suspending plaintiffs herein and its actions used to accomplish that suspension, are state actions within the meaning of Section 1983, Title 42, U.S.C.

Question of Whether Educational Institutions Can Proscribe Only Student Conduct That is Illegal and Impose Only Procedures That Comport With Criminal Law:

Plaintiffs contend the written regulations on which the college relied in their challenged suspensions are void as being beyond the powers of the college to prohibit because they are so broad as to cover conduct that is not illegal, i.e. not in violation of a federal or state law or muncipal ordinance.

The discipline of students in the educational community is, in all but the case of irrevocable expulsion, a part of the teaching process. In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community. Even then, the disciplinary process is not equivalent to the criminal law processes of federal or state criminal law. For,

while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social, and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound. Such cited cases as in Re Galt, 387 U.S. 1 (1967), Kent v. United States, 383 U.S. 541 (1966), and Cox v. Louisiana, 379 U.S. 536 (1965) are not applicable.

In the lesser disciplinary procedures, including but not limited to guidance counseling, reprimand, suspension of social or academic privileges, probation, restriction to campus and dismissal with leave to apply for readmission, the lawful aim of discipline may be teaching in performance of a lawful mission of the institution. The nature and procedures of the disciplinary process in such cases should not be required to conform to federal processes of criminal law, which are far from perfect, and designed for circumstances and ends unrelated to the academic community. By judicial mandate to impose upon the academic community in student discipline the intricate, time consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent. This Court will not make such imposition.

Relevancy of Standards of Student Conduct to a Lawful Mission of the Educational Institution:

The standard of conduct which the educational institution seeks to impose on a student must be one that is relevant to a lawful mission, process or function of the educational institution. It is not a lawful mission, process or function of an educational institution to prohibit the exercise of a right guaranteed by the Constitution or by a law of the United States to a member of the academic

community. Such prohibitions are not reasonably relevant to any lawful mission, process or function of the educational institution. Each case must be considered on its own particular facts to determine whether or not the standard of required student conduct involved possesses the necessary relevance.

It is relevant to the lawful mission of a college or other institution of higher education to prohibit participation in mass gatherings that are unruly or unlawful. Plaintiffs tacitly concede that unlawful demonstrations may be prohibited by college authorities but do not concede "unruly" ones may also be proscribed.

Webster's Third New International Dictionary, unabridged defines unruly as "not readily ruled, disciplined or managed: turbulent, uncontrollable." "Turbulent" is defined as "disposed or given to insubordination or disorder: causing great unrest: inciting violence or disturbance." Certainly, as reasonably interpreted and applied by the college such a prohibition as is contained in the challenged regulation is not a prohibition of a student demonstration that is peaceful in nature, according lawful respect for the rights and property of others. There is no indication the college is endeavoring to deprive these plaintiffs, or any of its students, of their constitutional rights of free speech, of peaceable assembly or of right to petition for redress of grievances; nor to "chill" any endeavor on their part to lawfully exercise such rights. See, Thornhill v. Alabama, 310 U.S. 88 and West Virginia Board of Education v. Barnette, 319 U.S. 624. Certainly the regulation concerning mass demonstrations, reasonably interpreted, and as interpreted and applied by the college in the instant case to a participant in student mass demonstrations involving unlawful conduct such as the illegal blocking of a public highway and street, and the destruction of school

property, is relevant to a lawful mission of the educational institution.[1] Neither the first amendment nor any other provision of the Constitution prohibits an educational institution from protecting itself against conduct that would damage or destroy it or its property in toto or in part.

Question of Whether the College Regulations Are Overly Broad and Too Vague to be the Basis of Disciplinary Action:

Plaintiffs contend the regulations under which the college acted are too vague and indefinite to be enforceable, relying on the criminal law and on criminal and juvenile cases concerning the "void for vagueness doctrine".

The legal doctrine that a prohibitory *statute* is void if it is overly broad or unconstitutionally broad does not, in the absence of exceptional circumstances, apply to standards of student conduct.[1]

Judicial notice is taken that outstanding educational authorities in the field of higher education believe, on the basis of experience, that detailed codes of prohibited student conduct are provocative and should not be employed in higher education. See, Brady and Snoxell, Student Personnel Work in Higher Education, p. 378 (Houghton-Mifflin, Boston, 1961). For this reason, general affirmative statements of what is expected of a student may be preferable in higher education. Such affirmative statements should, of course, be reasonably construed and applied in individual cases.

---

1. See General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, ... F. Supp. ..... for a listing of numerous lawful missions of educational institutions.

1. Statutes are enacted by federal or state legislatures and not by educational institutions for student disciplinary purposes as such. Hence, different considerations are involved.

An institution may establish appropriate standards of conduct (scholastic and behavioral) in any form and manner reasonably calculated to give adequate notice of the scholastic attainments and behavior expected of the student.

The notice of the scholastic and behavioral standards to the students may be written or oral, or partly written and partly oral, but preferably written. The standards may be positive or negative in form.

Standards so established may apply to student behavior on and off the campus when relevant to any lawful mission, process, or function of the institution. By such standards of student conduct the institution may prohibit any action or omission which impairs, interferes with, or obstructs the missions, processes and functions of the institution.

Standards so established may require scholastic attainments higher than the average of the population and may require superior ethical and moral behavior. In establishing standards of behavior, the institution is not limited to the standards or the forms of criminal law.

If the student knows or as a reasonable person should know that the action or conduct he is about to undertake is violative of the regulation or standard of conduct and he intentionally engages in such conduct, he is in no position to invoke the aid of judicial equity powers involving equitable doctrines to enjoin resultant disciplinary action. In the instant case both Esteban and Roberds were put on notice both by the regulations in question (and by plain common sense)[1] that their conduct was violative of the

1. Is a published (oral or written) standard necessary to advise a student he cannot cheat on exams, keep other students out of their classroom, strike a professor, talk loudly in class during the recitation of others, come to class in a bathing suit, curse his professor in the classroom, engage in disruptive mob action?

pertinent college standards contained therein and could result in severe disciplinary action. Esteban had knowledge of the college regulation that was reasonably calculated to give him notice he could not use vile language on and physically threaten authorized college personnel who in the course of their normal duties upon proper request reported his name to a faculty member. Roberds likewise should have known he could not be an active participant in a large student demonstration involving both illegal and destructive conduct.

Question of Roberds Being a "Mere" Spectator:

Roberds strongly urges there is no evidence that he was other than a mere spectator rather than a participant in the two demonstrations. One requirement of constitutional due process in student disciplinary proceedings is that no adverse action may be taken against the student on grounds which are not supported by any substantial evidence.

A federal district court will in appropriate circumstances review a student disciplinary proceeding to determine if the challenged disciplinary action was on grounds lacking support by any substantial evidence.

Roberds' claim of having been a mere spectator is somewhat incredible in view of all the evidence. Earlier he had inquired as to what would happen if he were to be a participant. This is indicative of his interest in being a participant. He wrote a letter to Representative Cantrill indicating he was considering action not consistent with that of being a mere spectator. He witnessed the unlawful and destructive actions over a substantial period of time on two evenings and did not withdraw and disassociate on either of them from the unruly and destructive group. His actions at the scene of the demonstrations were of a

type that reasonably could be deemed to be in the nature of encouraging, aiding, and abetting the demonstrations occurring rather than that of mere presence, innocent of any intent and conduct calculated to aid, abet, or encourage the occurrence. From all the evidence Dr. Lovinger could reasonably infer Roberds was a participant and not a mere, or innocent, spectator.[1] Hence, there was substantial evidence to support the disciplinary action taken against Roberds. This being so, it is unnecessary to consider Roberds' contention the regulation mentioned "participation" in but did not mention "contributing to" certain mass demonstrations.

In conclusion, attendance at a tax supported educational institution of higher learning is not compulsory. The federal constitution protects the equality of opportunity of all qualified persons to attend. Whether this protected opportunity be called a qualified "right" or "privilege" is unimportant. It is optional and voluntary. It is also invaluable, for education is basic to civilized society and to its members.

The voluntary attendance of a student in educational institutions of higher learning is a voluntary entrance into the academic community. By such voluntary entrance, the student voluntarily assumes obligations of performance and behavior reasonably imposed by the institution of choice relevant to its lawful missions, processes, and functions. These obligations are generally much higher than those imposed on all citizens by the civil and criminal

---

1. Although later in the same hearing he said he was only a spectator, he testified:

"Q. And Dr. Lovinger asked you if you were there and participated in these demonstrations on March 29th and March 30th, did he not? A. Yes, sir. Q. And you told him that you had, did you not? A. Yes, sir. Q. And you are telling this Court that now, are you not? A. Yes."

law. So long as there is no invidious discrimination, no deprival of due process, no abridgement of a right protected in the circumstances, and no capricious, clearly unreasonable or unlawful action employed, the institution may discipline students to secure compliance with these higher obligations as a teaching method or to sever the student from the academic community.

No student may, without liability to lawful discipline, intentionally act to impair or prevent the accomplishment of any lawful mission, process, or function of an educational institution.

A federal court should not intervene to reverse or enjoin disciplinary actions relevant to a lawful mission of an educational institution unless there appears one of the following:

(1) A deprival of due process, that is, fundamental concepts of fair play;

(2) Invidious discrimination, for example, on account of race or religion;

(3) Denial of federal rights, constitutional or statutory, protected in the academic community; or

(4) Clearly unreasonable, arbitrary or capricious action.

Careful review of the entire record convinces that none of the defendants engaged in conduct of the kind mentioned in any of these four items. There was substantial evidence to support the written charges brought by the college against Esteban and Roberds, and to support the college president's finding that plaintiffs had engaged in the conduct and acts with which they were charged. The written charges were based on portions of the college regulations relevant to a lawful mission of the educa-

tional institution. There was no failure to accord both procedural and substantive due process to Esteban and Roberds. They are not entitled to any of their requested relief.

This suit is hereby dismissed with prejudice.

/s/ Elmo B. Hunter,
Judge

APPENDIX B

MAJORITY OPINION OF THE EIGHTH CIRCUIT COURT OF APPEALS

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19,565

Alfredo Esteban and Steve Craig Roberds,

Appellants,

v.

Central Missouri State College, Warren C. Lovinger; W. Lester Simpson; Joe Herndon; Leland J. Culp; Virginia Cottlieb; Byron Constance and J. N. Cunningham,

Appellees.

} Appeal from the United States District Court for the Western District of Missouri.

[August 28, 1969.]

Before BLACKMUN, MEHAFFY and LAY, Circuit Judges.

BLACKMUN, Circuit Judge.

Alfredo Esteban and Steve Craig Roberds, students at Central Missouri State College, a tax-supported institution at Warrensburg, Missouri, were suspended on March

31, 1967, for two semesters but with the right thereafter to apply for readmission. The two, by their next friends, instituted the present action for declaratory and injunctive relief. The named defendants are the College, its President, and its Board of Regents. The plaintiffs allege, primarily, first, fifth, and fourteenth amendment violations. Judge Hunter, with a detailed memorandum denied them relief and dismissed their complaint. *Esteban* v. *Central Missouri State College*, 290 F.Supp. 622 (W.D. Mo. 1968). The plaintiffs appeal.

Jurisdiction is asserted under 28 U.S.C. § 1331 and § 1343 and 42 U.S.C. § 1981 and § 1983. We are satisfied as to federal jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983.

We note initially that, although the two semester suspension period has long since expired, neither plaintiff, up to the time of the oral argument on May 16, 1969, has taken the trouble to apply for readmission.[1]

The disciplinary action against the plaintiffs arose out of events which took place on or adjacent to the college campus on the nights of March 29 and 30, 1967. At that time Esteban was on scholastic probation and Roberds was on disciplinary probation. Esteban also had been on disciplinary probation over a knifing incident with a fellow student, but his disciplinary probation had expired a short time before.

Both sides in their appellate briefs specifically adopt findings of fact made by Judge Hunter with respect to

1. Counsel at oral argument advised us that Esteban was in VISTA and that he did not know the whereabouts of Roberds.

The defendants in their brief say the expiration date of the two semester suspension was August 18, 1967. We readily conclude that the passage of the two semesters does not render the case moot. See *Carafas* v. *LaVallee*, 391 U.S. 234, 237-40 (1968), and *Sibron* v. *New York*, 392 U.S. 40, 50-58 (1968).

these March 1967 events. Accordingly, we set forth certain of those findings here:

". . . These demonstrations took place at the intersection of the public street adjacent to the school campus and State Highway 13 and overflowed onto the sidewalks and campus. On the evening of March 29, some 350 students were present in the mass and on March 30, there were some 600 students included. As a partial result of these two mass demonstrations there was in excess of $600 damages and destruction of college property, including broken school building windows and destroyed shrubbery; eggs were thrown; the Dean of Men, Dr. Chalquist, was hanged in effigy, his 'dummy' torn up and set on fire; traffic was halted and blocked, cars were rocked, and their occupants ordered out into the street. The college president directed a number of his personnel, including Dr. Meverden, to go to the scene to restore order.

"ESTEBAN EVENT:

". . . The evening of March 29,[2] 1967, around 11:30 p.m., he left his dormitory about the time the 'disturbance' had subsided. Some of the students were proceeding along the street from the mass demonstration to their dormitories. Esteban proceeded down the sidewalk to within about 100 feet of the intersection of the scene of the mass demonstration and stayed there awhile. Dr. Meverden, a faculty member who was seeking to disperse students standing outside their dorms, approached Esteban and asked him to go inside the dormitory. Instead of complying, Esteban asked why, and on again being requested to go in, again asked why. He told Dr. Meverden that he was not in violation of any state, county, or federal law and that he had a right to be out there. Dr. Meverden asked for his student identification card

2. This is an obvious error. The date is March 30 and was so stated in the charge and by the witnesses at the hearing before the president, hereinafter referred to.

which by college regulation he was required to have in his possession at all times. Esteban said ('in rough words' according to one witness) he did not have it. Nor did he give his name. Dr. Meverden again requested him to go in the dormitory and get off the street. Esteban argued with Dr. Meverden and questioned his authority, saying there were no rules limiting the time men could stay outside the dorms. Shortly, and with the encouragement of other students present, he went into the dormitory. Dr. Meverden also went in and asked Gerald Haddock, the resident assistant of Esteban's dormitory, who Esteban was. Haddock was overheard by Esteban telling Dr. Meverden Esteban's name. Esteban, as Dr. Meverden was leaving, called Haddock a prick and a bastard and told him he 'would not be around very long.' According to Esteban's roommate, Esteban then angrily picked up a waste can and emptied the contents on the floor at the feet of Haddock.

"ROBERDS EVENT:

. . .

"Throughout both evenings of the mass demonstrations Roberds was present as a part of the crowd. On March 29, 1967, he arrived at the scene of the demonstration about 10:15 p. m. and returned to his dormitory about 10:45 p. m. On March 30, 1967, he arrived at the scene about 9:30 p. m. and remained until about 10:30 p. m. During the first night, while a part of the gathered crowd, he talked to students who were present in it. Roberds testified that the second evening, also while a part of the crowd at the demonstration, that 'I discussed some of the things that were going on, the rocking of the cars and the dummy. At that time I mentioned my disgust with the college, and we talked, as the people I had talked to had the same feeling.' He saw the dummy brought to the scene of the demonstration; saw it hung, torn up and burned by students in the crowd. He saw the

cars approached by the students, saw the cars rocked, saw the attempts to take the occupants out of the cars. He returned to his dormitory after the dispersal of the gathering. He stated he was at the demonstrations each evening simply as a 'spectator', not participating in any of the acts of violence or destruction." [Footnote omitted]

Both sides also adopt Judge Hunter's findings as to Roberds' situation prior to the March events:

"Prior to the mass demonstrations, Roberds had been placed on disciplinary probation and furnished a written statement of the terms of that probation. Dean Chalquist also orally explained those terms to him. He and Dean Chalquist conversed relative to his intention to participate in a demonstration. Roberds asked about the possible repercussions of his involvement in (future) demonstrations or disturbances. He was advised 'that any action on your part which may reflect unfavorably upon either you or the institution can be considered grounds for suspension.' Roberds, under date of February 5, 1967, wrote E. J. Cantrell, a Representative from his county in the Missouri Legislature, the following letter:

'* * * I assure you, I do not stand alone in my disgust with this institution. From suppression of speech and expression to ridiculous, trivial regulations this college has done more to discourage democratic belief than any of the world's tyrants. * * * My comrades and I plan on turning this school into a Berkeley if something isn't done.' "

[Footnotes omitted]

The procedural history of the case. These plaintiffs, after their suspensions, had filed earlier complaints (Nos. 16,473/4) in the Western District of Missouri against the same defendants. Those suits also had come before Judge Hunter. The court concluded that procedural due process

had not been afforded the students and that "the critical defect in the hearing procedure used by the college was the fact that the person to whom the students were permitted to make their explanation or showing, Dr. Chalquist, was only one of a number of persons on the board which made the recommendation of suspension." Accordingly, the court directed the defendants to grant each of the plaintiffs a new hearing on such charges as the defendants desired to press. The court prescribed the procedure to be followed. This included a written statement of the charge to be furnished the student on at least 10 days' notice; a hearing before the college's president, as the one person possessing authority to expel or suspend; advance inspection by the student of any affidavits or exhibits which the College intended to submit at the hearing; the student's right to have counsel present with him at the hearing; the right to present his version as to the charge and to make such showing by way of affidavits, exhibits, and witnesses as he desired; the right to hear the evidence against him and to question any witness giving adverse evidence; the president's determination of the facts solely on the evidence presented at the hearing and a statement by him in writing of his findings as to guilt or innocence of the conduct charged and the disposition, if any, to be made by way of disciplinary action; and permission to each side at its own expense to make a record of the events at the hearing. However, the students' request to be reinstated subject to the outcome of the hearing was denied. *Esteban v. Central Missouri State College*, 277 F.Supp. 649 (W.D. Mo. 1967).

Thereafter, and in line with the court's directions, written charges and notice of hearing were served on Esteban and Roberds. The charge against Esteban read:

"You are hereby notified that you are charged with contributing to and participating in an unruly and unlawful mass gathering occurring on the 30th day of March, 1967, at and near Central Missouri State College in that you, the said, Alfredo Esteban, did resist efforts of one Dr. M. L. Meverden in dispersing said mass gathering, failed and refused to identify yourself to Dr. Meverden as requested and used vile and obscene language towards and threatened a resident assistant of the College at Foster-Knox Hall."

That against Roberds read:

"You are hereby notified that you are charged with contributing to and participating in an unruly and unlawful mass gathering occurring on or about the 29th and 30th days of March, 1967 at and near Central Missouri State College in that you, the said Stephen Craig Roberds, on the 5th day of February, 1967 directed correspondence to Mr. E. J. Cantrell of the Missouri Legislature evidencing your intention to participate in such mass gathering, did thereafter advise Dean Hollis Chalquist, Dean of Men, of your intention to participate in such demonstration at which time you were specifically advised that such participation would result in immediate suspension from Central Missouri State College and that you did thereafter continue to contribute to and participate in said mass gathering all of which actions were in violation of the terms and provisions of your disciplinary probation."

The college regulations in effect at the time, and to the extent pertinent, provided:

"The conduct of the individual student is an important indication of character and future usefulness in life. It is therefore important that each student maintain the highest standards of integrity, honesty and morality. All students are expected to conform to ordinary and accepted social customs and to conduct

themselves at all times and in all places in a manner befitting a student of Central Missouri State College.

"All students that enroll at C.M.S.C. assume an obligation to abide by the rules and regulations of the college as well as all local, state and federal laws.

"When a breach of regulations involves a mixed group, ALL MEMBERS ARE HELD EQUALLY RESPONSIBLE.

"Conduct unbefitting a student which reflects adversely upon himself or the institution will result in disciplinary action."

"Mass Gatherings—Participation in mass gatherings which might be considered as unruly or unlawful will subject a student to possible immediate dismissal from the College. Only a few students intentionally get involved in mob misconduct, but many so-called 'spectators' get drawn into a fracas and by their very presence contribute to the dimensions of the problems. It should be understood that the College considers no student to be immune from due process of law enforcement when he is in violation as an individual or as a member of a crowd."

The hearing required by Judge Hunter's determination as to procedural due process took place on November 3, 1967. The president made findings generally along the lines of those made by Judge Hunter and which now have been adopted by the parties to this appeal, and reaffirmed the previous suspensions. As to Esteban:

"I am of the further opinion that this student's resistance to Dr. Meverden's efforts directed towards dispersing the demonstration contributed to the unruly and disorderly situation resulting from the demonstration and unquestionably constituted participation in the mass gatherings even though at the specific time of the occurrence the gathering was in the process of being dispersed."

As to Roberds:

> ". . . Mr. Roberds has repeatedly admitted attending the demonstrations on both nights but qualifies his attendance as being that of a spectator and the evidence does not show otherwise. It is apparently the former student's position that his presence at the disturbances as a spectator does not constitute a violation of the College regulations relative to mass gatherings. I am of the opinion that it does. At the outset it should be made clear that the very purpose of the regulation is to prevent an unauthorized mass gathering of students which gatherings are by their very nature made up of a great number of spectators. It is the spectators that create the mass which in turn leads, as in this case, to incidents of unruly and violent action. If there were no so called spectators there would be no mass gathering.
>
> "Furthermore, the regulation in this instance makes it clear that spectators will be considered to be contributing to the mass gathering and will be subject to similar disciplinary action."

When the suspensions were thus affirmed, the present action was instituted by the plaintiffs.

We accept the statement, made by plaintiffs' counsel at oral argument, that the record is devoid of anything which indicates a connection between the two plaintiffs. Actually, so far as the record discloses, they may not even have known each other. We therefore treat their situations as separate and distinct.

The plaintiffs' argument appears to be (1) that the trial court's findings of fact are clearly erroneous; (2) that the college's regulation and action violated rights of freedom of speech and of peaceful assembly and to petition; and (3) that the regulation is so vague as to deny substantive due process.

1. *The findings and the supportive evidence.* Both sides, of course, acknowledge that the governing standard as to clear error, under Rule 52(a), Fed. R. Civ. P., is the usual one whether, on the entire evidence, one is left with the definite and firm conviction that a mistake has been committed. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Commissioner* v. *Duberstein*, 363 U.S. 278, 291 (1960); *O'Rieley* v. *Endicott-Johnson Corp.*, 297 F.2d 1, 6 (8 Cir. 1961). The Supreme Court, in *Duberstein*, emphasized that this rule "itself applies also to factual inferences from undisputed basic facts."

With this standard in mind we are drawn inevitably to the conclusion that Judge Hunter's findings were not clearly erroneous.

a. *Esteban.* This plaintiff, by the adoption of the trial court's findings of fact, now concedes that he left his dormitory as other students were proceeding along the street from the mass demonstration; that he proceeded toward the scene of the demonstration and within 100 feet thereof and "stayed there awhile"; that he was requested by Doctor Meverden, a member of the college staff, to go into his dormitory; that Doctor Meverden was seeking to disperse the students; that he, Esteban, did not comply with these directions but asked more than once why he was being told to go in; that he insisted on his right to be out there; that in response to Meverden's request to produce his identification card he used rough language in his negative reply and refused to give his name; that he questioned Meverden's authority; that only with the encouragement of other students did he go in the dormitory; that Meverden then asked the dormitory resident who Esteban was; and that, when this information was given, Esteban responded with gutter language and with a threat and dumped a waste can's contents at the resident's feet.

Esteban's argument is that conduct not included within the charge is not relevant; that the charge of participation in an unlawful mass gathering was supported only by the specification of resisting Meverden's efforts to disperse and not at all by his refusal to identify himself or by the language he used toward the resident; that the evidence shows that Esteban was not involved in the demonstration or at its scene; that he was studying while it took place; that he was standing a half block away peacefully talking with other students when "accosted" by Meverden; and that there was no college rule which gave Meverden the authority to order him into the dormitory.

We are not at all convinced by this attempted dissection of the aggregate facts. Moments before Esteban's purposeful entrance on the scene an unruly mass gathering had been in control at the intersection. The mob extended to the college premises. Destruction of college property had taken place. Innocent and unsuspecting members of the public had been stopped in their automobiles, had had their cars rocked, and had been ordered out by the mob. It was an explosive situation participated in by college students and affecting college property. Meverden was dispatched there in his capacity as a staff member and at the order of the college president in an attempt to restore order and thus to protect the students from further serious trouble. His assignment, obviously, was not the most enviable one. Just as obviously, the dispersal of the students and their return to the dormitories were effective remedies for a situation which had already erupted and which remained eruptive. Meverden's inquiry of Esteban was made with authority and with reason. He was met with the very attributes of the mob: defiance, challenge to his authority to ask people to move on, a refusal to reveal one's name, the language of a bully, and insults. This, it will be remembered, although perhaps not at that moment

known to Meverden, was a student then on scholastic probation and only shortly before on disciplinary probation because of a knifing incident. We fail to see, understand, or comprehend Esteban's argument that there was no substantial evidence of misconduct encompassed within the charge against him. His actions, obviously, were in resistance to Meverden's reasonable efforts to disperse the students and to prevent the recurrence or continuance of mob action. In our view, Esteban by his resistance was a participant in the affair even though he may not have been one of those who actually interfered with the travel rights of others and who destroyed college property.

b. *Roberds.* This plaintiff's case differs factually from Esteban's. But, by the adopted findings, Roberds concedes that he had asked the dean about the result which would flow from his involvement in future demonstrations or disturbances; that he was informed, in response to that inquiry on his part, that any action which would reflect unfavorably upon him or the College, could be considered grounds for suspension; that he was "present as a part of the crowd" on both evenings; that he was so present for a half hour on the first night and for an hour on the second night; that he discussed with others some of the things which were going on and expressed his "disgust with the college"; that he returned to his dormitory only after the gathering was dispersed; and that he wrote the letter to the legislator.

Roberds' argument follows Esteban's to the point where it says that two of the three specifications of a charge failed to support that charge. Roberds then urges that his letter to the legislator is a first amendment petition "for a redress of grievances"; that it does not at all support a finding of intent to participate in any unruly demonstration; that, anyway, intent alone is not participation; that he did not tell the dean he intended to participate; that he

was not a ringleader and did not participate; that, instead, he was a mere spectator, standing and sitting "on the sidewalk, watching the events"; that observing is not participating; and that observation is not enough.

We observe in this connection that we do not read Roberds' letter to his legislator as a mere petition for redress of grievances which he would have every right to compose and present. The letter specifies no grievance which we can ascertain. It speaks only of disgust and, as we have noted, it contains a flat threat. His right to write is not an issue. His intent and his participation are in issue.

Mere presence, under certain circumstances, has been held insufficiently representative of criminal involvement. See *Barr* v. *City of Columbia*, 378 U.S. 146, 150 (1964); *United States* v. *Romano*, 382 U.S. 136 (1965); *Bozza* v. *United States*, 330 U.S. 160, 162-64 (1947); *Rollins* v. *Shannon*, 292 F.Supp. 580, 590 (E.D. Mo. 1968). Assuming, without deciding, that such criminal cases would afford precedent for a civil situation of the kind which confronts us, we note that the test as to the propriety of the inference to be drawn from presence is that of rational connection between the facts proved and the ultimate fact presumed. *United States* v. *Romano*, supra, 382 U.S. at 139; *United States* v. *Gainey*, 380 U.S. 63 (1965). That rational connection, we hold, is definitely present here.

Here, again, we are not persuaded as to Roberds' peaceful spectator status or that the court's findings as to him have no substantial support in the record. Roberds was present at, and as a part of, the milling mass on both nights. He was there as "a part of the gathered crowd." He, too, may not have stopped any automobile or rocked it or forced out its occupants or damaged property, but these incidents took place and were caused by the mob and he was a part

of that mob. Mob action or, for that matter, the old style lynching action, always presents to the self-proclaimed "spectator" the opportunity to claim that he was merely watching, that he did not participate, and that someone else did the job. But one may participate by being present and "talking it up" as Roberds concededly did. And when this is buttressed by the intent evidenced from his letter's expressions of disgust and tyranny and his "plan on turning this school into a Berkeley if . . . .", we have, in our view, substantial and certainly adequate support for the inferences the trial court drew and for its findings.

2. *The First Amendment rights.* Having resolved the issue as to the sufficiency of the evidence against the plaintiffs, we then encounter the constitutional argument. Were their rights of free speech and of free assembly and to petition denied to them?

Obviously, one does not lose his first amendment rights by matriculation at a college. Those rights follow one through the classroom door and, as we have had occasion recently to observe, even, to a great extent, through a penitentiary's doors. *Sharp* v. *Sigler*, 408 F.2d 966, 970 (8 Cir. 1969); *Jackson* v. *Bishop*, 404 F.2d 571, 576 (8 Cir. 1968). And what better or more ideal place is there for free discussion and for the exchange of ideas than academic halls? See *Epperson* v. *Arkansas*, 393 U.S. 97 (1968).

Long settled, too, is the principle that the first amendment freedoms of speech and of association are applicable to the states, either by the due process route of the fourteenth amendment or directly under the first amendment. See, for example, *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925); *De Jonge* v. *Oregon*, 299 U.S. 353, 364 (1937); *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940); *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958); *Edwards* v. *South Caro-*

lina, 372 U.S. 229, 235 (1963); *Cox* v. *Louisiana*, 379 U.S. 536 (1965).

On this issue, however, we need look no further than a recent decision of the Supreme Court concerning the application of first amendment rights in the academic environment. In *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969), a case from this circuit, the Court first observed,

> "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." 393 U.S. at 506.

and then held that the quiet and passive wearing by students of black armbands to protest government policy in Vietnam was within the protection of the Free Speech and Due Process Clauses of the first and fourteenth amendments. But the emphasis in the majority opinion is evident from the following:

> ". . . As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it.
>
> . . .
>
> ". . . On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

". . . It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct primary First Amendment rights akin to 'pure speech.'

"The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

". . . Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

. . .

"In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.

. . .

". . . When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without col-

liding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

". . . The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances.

. . .

"As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred" (citations omitted). 393 U.S. 505, 507-09, 512-14.

That emphasis is on the absence of "actually or potentially disruptive conduct" by the participants; on the need of school officials, consistent with constitutional safeguards, "to prescribe and control conduct in the schools"; on "a silent, passive expression" unaccompanied by any disorder or disturbance; on the absence of evidence of interference with the school's work or with "the rights of other students to be secure and to be let alone"; on the absence of threats or acts of violence on school premises; on the absence of a finding of material interference "with the requirements of appropriate discipline in the operation of the school"; and on the absence of material disruption of classwork or "substantial disorder or invasion of the rights of others." It is obvious that where there is actual or potentially disruptive conduct or disorder or disturbance by the petitioners, or interference with the work of the school or of the rights

of other students, or threats or acts of violence on the school premises, or substantial disorder, then reasonable action by school authorities is constitutionally permitted. There must, however, be more than mere fear and apprehension of possible disturbance.

This emphasis, and the distinction between what is constitutionally permissible and what is not, is also apparent in the Court's denial of certiorari, 394 U.S. 905, in *Barker* v. *Hardway*, 399 F.2d 638 (4 Cir. 1968), a per curiam opinion which in turn had affirmed the dismissal of an action to enjoin enforcement of suspension of state college students. 283 F.Supp. 228 (S.D. W.Va. 1968). Mr. Justice Fortas, who wrote the majority opinion in *Tinker*, concurred in the denial of certiorari in *Barker* with observations that the Barker petitioners were suspended "*not* for expressing their opinions on a matter of substance, but for violent and destructive interference with the rights of others", and that the findings established that the petitioners were "engaged in an aggressive and violent demonstration, and not in peaceful, nondisruptive expression." Their conduct, therefore, was "clearly not protected by the First and Fourteenth Amendments."

So it is here. Judge Hunter's findings have been quoted above. We have found them sufficiently supported by the record. They, too, concern an aggressive and violent demonstration and something quite apart from "peaceful, nondisruptive expression." They, too, focus upon "destructive interference with the rights of others." They disclose actual or potentially disruptive conduct, aggressive action, disorder and disturbance, and acts of violence and participation therein by these plaintiffs. Their conduct, therefore, was not protected by the first and fourteenth amendments.

3. *The regulations.* These are additionally attacked for vagueness and overbreadth and hence on substantive due process grounds. Some of the loyalty oath cases are cited and it is said that the regulations' word "unlawful" is only a legal conclusion and that their references to "unruly" and "spectators" and "which might be considered" are undefined and possess no standards. The regulations are likened to city ordinances which have been struck down when they lack sufficiency of definition. It is then argued that "young people should be told clearly what is right and what is wrong, as well as the consequences of their acts," *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), and other cases are cited. Finally, it is said that the regulations impinge and have a chilling effect upon first and fourteenth amendment rights.

The answers to all this, we think, are several. First, the college's regulations, per se, do not appear to us to constitute the fulcrum of the plaintiffs' discomfiture. The charges against Esteban and Roberds did not even refer to the regulations. Roberds was disciplined because he had participated in the demonstrations in the face of specific warning delivered by personal interview with the dean. This was defiance of proper college authority. Esteban was disciplined because of his refusal to comply with an appropriate request by Doctor Meverden and because of his childish behavior and obscenity toward college officials. This, too, was defiance of proper college authority. There was no confusion or unawareness in either case. The exercise of common sense was all that was required. Each plaintiff knew the situation very well, knew what he was doing, and knew the consequences. Each, we might note, had had prior disciplinary experience. Their respective protestations of young and injured innocence have a hollow ring.

Secondly, we agree with Judge Hunter that it is not sound to draw an analogy between student discipline and criminal procedure, that the standard of conduct which a college seeks to impose must be one relevant to "a lawful mission, process or function of the educational institution", and that,

> "... Certainly the regulation concerning mass demonstrations, reasonably interpreted, and as interpreted and applied by the college in the instant case to a participant in student mass demonstrations involving unlawful conduct such as the illegal blocking of a public highway and street, and the destruction of school property, is relevant to a lawful mission of the educational institution." 290 F.Supp. at 629. [Footnote omitted].

Thirdly, we do not find the regulation at all difficult to understand and we are positive the college student, who is appropriately expected to possess some minimum intelligence, would not find it difficult. It asks for the adherence to standards of conduct which befit a student and it warns of the danger of mass involvement. We must assume Esteban and Roberds can read and that they possess some power of comprehension. Their difficulty was that they chose not to read or not to comprehend.

Fourthly, we see little basically or constitutionally wrong with flexibility and reasonable breadth, rather than meticulous specificity, in college regulations relating to conduct. Certainly these regulations are not to be compared with the criminal statute. They are codes of general conduct which those qualified and experienced in the field have characterized not as punishment but as part of the educational process itself and as preferably to be expressed in general rather than in specific terms. See E. Williamson and J. Foley, *Counseling and Discipline*, 79-83 (1949); E. Williamson, *Student Personnel Services in*

Colleges and Universities, 166 (1961); Brady and Snoxell, *Student Discipline in Higher Education* 10 (Student Personnel Series No. 5, The American College Personnel Association (1965)).

We agree with those courts which have held that a school has inherent authority to maintain order and to discipline students. *State ex rel. Sherman* v. *Hyman*, 180 Tenn. 99, 171 S.W.2d 822, 827 (1942), cert. denied, 319 U.S. 748; *Jones* v. *State Bd. of Educ.*, 279 F.Supp. 190, 202 (M.D. Tenn. 1968), aff'd 407 F.2d 834 (6 Cir. 1969); *Buttny* v. *Smiley*, 281 F.Supp. 280, 285, 286 (D. Colo. 1968); *Zanders* v. *Louisiana State Bd. of Educ.*, 281 F.Supp. 747, 757 (W.D. La. 1968); *Barker* v. *Hardway*, supra, 283 F. Supp. at 235. We further agree that a school has latitude and discretion in its formulation of rules and regulations and of general standards of conduct. *Goldberg* v. *Regents*, 57 Cal. Rptr. 463, 472 (Ct. App. 1967); *Dickey* v. *Alabama State Bd. of Educ.*, 273 F.Supp. 613, 618 (M.D. Ala. 1967); *Jones* v. *State Bd. of Educ.*, supra; *Buttny* v. *Smiley*, supra; *Cornette* v. *Aldridge*, 408 S.W.2d 935, 941 (Tex. Civ. App. 1966).

We regard as quite distinguishable cases such as *Hammond* v. *South Carolina State College*, 272 F.Supp. 947 (D. S.C. 1967), and *Dickey* v. *Alabama State Bd. of Educ.*, supra, where the focus was on an attempted restraint of peaceful assembly or speech. Our attention has been called to the fact that Judge Doyle, in his recent opinion in *Soglin* v. *Kauffman*, 295 F.Supp. 978, 990-91 (W.D. Wis. 1968), expresses disagreement with the observations of Judge Hunter on this aspect of the case. To the extent that, in this area, Judge Doyle is in disagreement with Judge Hunter, we must respectfully disagree with Judge Doyle.

The appellants argue, to what exact purpose we are not sure, that attendance by a Missouri resident at a publicly supported educational institution of his state is an important right. We are not certain that it is significant whether attendance at such a college, or staying there once one has matriculated, is a right rather than a privilege. Education, of course, is vital and valuable, *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954), and remaining in college in good standing, much like reputation, is also something of value. *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5 Cir. 1961), cert. denied, 368 U.S. 930. So, too, is one's personal freedom. But one may act so as constitutionally to lose that freedom. And one may act so as constitutionally to lose his right or privilege to attend a college.

College attendance, whether it be a right or a privilege, very definitely entails responsibility. This is fundamental. It rests upon the fact that the student is approaching maturity. His elementary and secondary education is behind him. He already knows, or should know, the basics of decent conduct, of nonviolence, and of respect for the rights of others. He already knows, or should know, that destruction of property, threats to others, frightening passersby, and intrusions upon their rights of travel are unacceptable, if not illegal, and are not worthy of one who would pursue knowledge at the college level.

These plaintiffs are no longer children. While they may have been minors, they were beyond the age of 18. Their days of accomplishing ends and status by force are at an end. It was time they assumed at least the outward appearance of adulthood and of manhood. The mass denial of rights of others is irresponsible and childish. So is the defiance of proper college administrative authority ("I have the right to be here"; "I refuse to

identify myself"; gutter abuse of an official; the dumping of a trash can at a resident's feet; "I plan on turning this school into a Berkeley if . . . ."; and being a part of the proscribed college peace-disturbing and property-destroying demonstration). One might expect this from the spoiled child of tender years. One rightly does not expect it from the college student who has had two decades of life and who, in theory, is close to being "grown up."

Let there be no misunderstanding as to our precise holding. We do not hold that any college regulation, however loosely framed, is necessarily valid. We do not hold that a school has the authority to require a student to discard any constitutional right when he matriculates. We do hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct; that, as to these, flexibility and elbow room are to be preferred over specificity; that procedural due process must be afforded (as Judge Hunter by his first opinion here specifically required) by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures; that school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure; and that the courts should interfere only where there is a clear case of constitutional infringement.

After all, the test, we feel, is that of reasonableness. *Dickey* v. *Alabama State Bd. of Educ.*, supra, 273 F.Supp. at 618. On that standard we perceive here no denial of constitutional rights of Esteban or of Roberds. If these two plaintiffs are really serious in what is said to be their

protestations of desire to complete their college education, we naturally assume that they will apply for readmission. We are mildly surprised that they have not done this as yet. We also assume, of course, that the College will view their applications, if and when they are ever submitted, with the respect and deferences to which they are entitled.

Affirmed.

APPENDIX C

DISSENTING OPINION IN THE EIGHTH CIRCUIT COURT OF APPEALS

Lay, Circuit Judge, dissenting:

I respectfully dissent. First, and foremost, I reject the overall thesis of the district court, as acquiesced in by the majority opinion, that a federal court has jurisdiction under the Civil Rights Act *to review* student discipline by school officials. I generally agree with the district court's statement that it should not assume jurisdiction in student disciplinary cases under the Civil Rights Act unless there appears one of the following:

> "(1) A deprival of due process, that is, fundamental concepts of fair play;
>
> "(2) Invidious discrimination, for example, on account of race or religion;
>
> "(3) Denial of federal rights, constitutional or statutory, protected in the academic community; or
>
> "(4) Clearly unreasonable, arbitrary or capricious action." 290 F.Supp. at 631.

However, I reject the district court's procedural approach of reviewing the sufficiency of the evidence of the disciplinary proceedings conducted by school officials. The trial court has posited this test to be:

"A federal district court will in appropriate circumstances review a student disciplinary proceeding to determine if the challenged disciplinary action was on grounds lacking support by any substantial evidence."[1] 290 F.Supp. at 631.

In an action under 42 U.S.C. § 1983 of the Civil Rights Act, federal jurisdictional proof must relate to the denial of a federal right under color of state law. A complaint filed under civil rights law does not embrace a "review" to determine the existence of "substantial evidence" of any state proceeding. This approach attempts to place state school officials in the same role as a federal administrative agency subject to the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (1966). See e.g., the same standard of review this court recently applied to the findings of the Federal Aviation Administrator. *John Doe* v. *Department of Transp.*, No. 19,183 (8 Cir. July 16, 1969). The district court's theory of review in essence misconstrues the very purpose of the civil rights legislation as it relates to state action. The Civil Rights Act was not intended to broaden the Administrative Procedure Act so as to include review of state agencies.[2] The Adminis-

1. Presumably, this last statement is based upon the district court's "General Order On Judicial Standards Of Procedure And Substance In Review Of Student Discipline In Tax Supported Institutions Of Higher Education." 45 F.R.D. 133 (1968). This same standard of review is erroneously compounded in other cases from the same district, see e.g., *Scoggin* v. *Lincoln Univ.*, 291 F. Supp. 161 (W.D. Mo. 1968).

2. One law review authority indicates that "It is well settled that the student has a right to appeal the determination by the university adjudicatory system to a state or federal court for review." Johnson, Constitutional Rights of College Students, 42 Texas L.Rev. 344, 361 (1964). The author relies upon Davis, Administrative Law § 7.10 (1958). Davis does not support this view nor does the federal case cited: *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150 (5 Cir. 1961). *Dixon* is based solely upon § 1983 and the prerequisite allegation of denial of federal rights by state action.

trative Procedure Act can only encompass "authority of the Government of the United States." The majority opinion here treats the district court's opinion as setting forth "findings of fact." However, it is clear that the district court's opinion sets forth merely a "summary" of the evidence in the school proceeding and the legal conclusion that there was "substantial evidence" to support *the president's findings.*

A civil rights action under § 1983 is a separate proceeding which requires a trial de novo on the claim relating to a denial of federal rights. Cf. *Barker* v. *Hardway*, 399 F.2d 638 (4 Cir. 1968), cert. denied, 394 U.S. 905 (1969). It does not authorize "appellate" review. The parties may choose to furnish evidence by stipulation from prior transcripts in extra or quasi-judicial proceedings. However, in an action filed under § 1983 a district judge is not bound by a prior findings of fact of any state official. It would be incongruous to say that the state determination of the constitutionality of its own action can bind a federal court even though there be "substantial evidence" to support the state official's finding. This would make the "state-defendant," who is the "accused," the self-arbiter and "judge" of its own conduct. The Civil Rights Acts do not authorize a federal district court to decide a plaintiff's claim on the basis that there is or is not "substantial evidence" supporting the finding of a state official. A federal district court is clearly obligated to make its own findings from the evidence submitted. In an action under § 1983 a plaintiff has the burden of proving his allegations under the same standards as in any other civil case. The district court's mission is to make findings of fact and conclusions of law as to whether in fact or in law state action has denied to a plaintiff any federal right. There is a fundamental difference between a court sitting in review to

pass upon the "substantiality" of evidence and its acting as the fact finder itself. Cf. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 480 n. 12 (1951). Federal courts do not belong in the hierarchy of state educational institutions as a supreme board of review to weigh evidence as to an institution's disciplinary rulings. Public education is within the control of state and local officials and should remain there. We are in agreement that principles of federalism do not justify federal court intervention in the daily operation of school systems and the resolution of problems which are remote from federal rights. These principles should make clear that federal courts do not possess the competence in the field of public education to moralize, lecture or otherwise *review* the evidence resulting in discipline of students by school officials. This is not the purpose of the Civil Rights Act. To hold that it is, truly arrogates to federal courts that which is a function of the states themselves. And conversely, but of greater significance, *a federal judge should not yield his jurisdiction or competency to protect fundamental liberties of individual citizens to a school administrator.*

If there existed on the present record conflicting evidence as to the denial of a federal right, I would remand these cases to the district court for a finding of fact and judgment on the merits. This would require specific findings of fact by the district court as to whether a federal right was improperly denied by state action. I would recommend a direction that the trial court's findings are not to constitute in any form a conclusory review as to the sufficiency of the evidence in the school proceedings. However, based upon the evidence here, and for different reasons and results, I do not find a remand necessary in either the Esteban or Roberds case.

In the Esteban case, based upon the record before us, there is no evidence involving the denial of a federal right. According to Dr. Lovinger, Esteban was expelled from a state school for (1) insubordination growing out of a request by a school official to have Esteban return to his dormitory at a time when there had been campus disturbances nearby, (2) using, at that time, vile and obscene language toward college officials and (3) threatening a resident assistant of the college. There exists no denial of federal rights in these facts. There cannot exist a claim that there is "no basis in fact" to support the above charges in view of Esteban's own admission of these facts. Cf. *Freeman* v. *Gould Special Sch. Dist.*, 405 F.2d 1153, 1161 (8 Cir. 1969) (dissenting opinion).[3] Esteban claims he was charged with participation in the unlawful demonstration and that there exists no evidence to support this charge. However, it is clear that his dismissal was actually based upon the incidence (also charged) following Dr. Meverden's request that he return to his dormitory. Esteban, although asserting a denial of First Amendment rights has not shown any proof that he was denied any freedom to speak or of assembly. He asserts he was not

3. If the district court's "substantial evidence" test is intended as one that simply seeks to determine whether the state action had "basis in fact," then the district court has still procedurally erred. A de novo trial under the Civil Rights Act on whether there is "no basis in fact"* to support a school expulsion, does not involve a review of the sufficiency of the evidence in the school proceedings. A de novo trial again requires separate factual findings by the federal district court. Furthermore, a determination that there is or is not a "basis in fact" is a far different test than a judicial inquiry as to whether there exists "substantial evidence." See *Dickinson* v. *United States*, 346 U.S. 389, 396 (1953). See discussion in Davis, Administrative Law § 29.07 (1958).

*This assumes, of course, that an allegation of "no basis in fact" for state action constitutes a stated claim for relief under the Civil Rights Act. The majority opinion in *Freeman* v. *Gould Special Sch. Dist.*, 405 F.2d 1153 (8 Cir. 1969), disagrees with this view.

an active participant in any disturbance and therefore concludes that it was improper for school officials to order him to his dormitory. Dr. Meverden's assigned job was to break up the demonstration which had involved violent acts by some students. In order to accomplish this he requested students to go to their dormitories. Such action by university authorities is not so unreasonable that it may be considered as violating First Amendment rights. If a state school chooses to discipline a student for conduct disrespectful to faculty members, there is no federal right involved.

This brings me to Roberds. It is once again clear that the district court's judgment was erroneously premised upon its review as to the sufficiency of the evidence to support Dr. Lovinger's finding. Again I submit that the trial in the district court should have been a de novo determination as to whether or not Roberds' federal rights were denied. Plaintiff simply had the burden of proving, *by the preponderance of evidence,* that his federal rights were denied. No party need show the presence or absence of "substantial evidence," whatever that term may mean here, to support the president's finding. Where basic constitutional values are involved a federal court is not invading the realm of school administration but dealing with rights which attach to every citizen. Justice Jackson made this clear in *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 639-40 (1943):

> "Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. . . . we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history

> authenticates as the function of this Court when liberty is infringed."

As set forth in *Tinker* v. *Des Moines Ind. Community School Dist.*, 393 U.S. 503 (1969), school officials may not deprive students of basic liberties unless the exercise of that liberty disrupts classwork or involves substantial disorder or constitutes an invasion of the rights of others. As the Supreme Court said:

> "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." 393 U.S. at 511.

However, once again it should not be necessary to remand for proper findings. The evidence is undisputed as to the events surrounding Roberds' conduct. There is no evidence whatsoever to show that Roberds was a "participant" in any unlawful disturbance or illegal demonstration. The district court concluded that "[f]rom all the evidence Dr. Lovinger could reasonably infer Roberds was a participant and not a mere, or innocent, spectator." 290 F.Supp. at 631. The difficulty with this conclusion is that Dr. Lovinger, who conducted the only evidential hearing, found just to the contrary.[4]

Dr. Lovinger held:

> "Under these circumstances Mr. Roberds has repeatedly admitted attending the demonstrations on both nights *but qualifies his attendance as being that*

---

4. It is significant, to me at least, that the trial court is not making an independent finding of "participation," but concluding that there was "substantial evidence" to support Dr. Lovinger's finding. If the trial court's review was procedurally sound, which I dispute, it nevertheless would be in error, since as discussed, Dr. Lovinger concluded that Roberds was nothing more than a spectator. However, *the issue was not whether the evidence would allow Dr. Lovinger to find Roberds was a participant in unlawful acts but whether in fact Roberds was or was not one.*

of a spectator and the evidence does not show otherwise. It is apparently the former student's position that *his presence* at the disturbances as a spectator does not constitute a violation of the College regulations relative to mass gatherings. *I am of the opinion that it does.*" (My emphasis.)

This conclusion was in part consistent with the university's regulation which read:

> "Mass Gatherings—*Participation* in mass gatherings which *might be considered as unruly or unlawful* will subject a student to possible immediate dismissal from the College. Only a few students intentionally get involved in mob misconduct, but many so-called 'spectators' *get drawn into a fracas and by their very presence contribute to the dimensions of the problems.* It should be understood that the College considers no student to be immune from due process of law enforcement when he is in violation as an individual or as a member of a crowd." (My emphasis.)

The president commented on this regulation:

> "At the outset it should be made clear that the very purpose of the regulation is to prevent *an unauthorized gathering of students which gatherings are by their very nature made up of a great number of spectators. It is the spectators that create the mass which in turn leads, as in this case, to incidents of unruly and violent action.* If there were no so called spectators there would be no mass gathering.
>
> . . . .
>
> "Furthermore, the *regulation in this instance makes it clear that spectators will be considered to be contributing to the mass gathering and will be subject to similar disciplinary action.*" (My emphasis.)

The difficulty with President Lovinger's viewpoint is, in part at least, that it is basically contrary to constitutional principles of free speech and free assembly.

However, the district court points out as part of the "substantial evidence" to sustain Dr. Lovinger's supposed conclusion that Roberds was a "participant" and not a "spectator" the following statements:[5]

(1) "Earlier he [Roberds] had *inquired* as to what would happen if he were to be a participant. This is indicative of his interest in being a participant."

(2) "He wrote a letter to Representative Cantrill indicating he was *considering* action not consistent with that of being a mere spectator."

(3) "He *witnessed* the unlawful and destructive actions over a substantial period of time on two evenings and did not withdraw and disassociate on either of them from the unruly and destructive group." (My emphasis.) 290 F.Supp. at 631.

---

5. The opinion of the trial court likewise relies upon Roberds' testimony in the first hearing. The district court states in his opinion:

"Although later in the same hearing he said he was only a spectator, he testified:

"Q. And Dr. Lovinger asked you if you were there and participated in these demonstrations on March 29th and March 30th, did he not? A. Yes, sir. Q. And you told him that you had, did you not? A. Yes, sir. Q. And you are telling this Court that now, are you not? A. Yes.'" 290 F.Supp. at 631 n. 9.

However, Roberds' statement cannot in all fairness be treated as an admission. The following questions and answers immediately follow the above portion quoted in the transcript:

"THE COURT: Excuse me. So that there is no mistake about it, the question was that you were present and participated. Is that what you told him?

"THE WITNESS: No.

"(By Mr. Wesner) All right. What did you tell him?

"THE COURT: What did you tell him? What did you tell both of these gentlemen? Start with the first.

"THE WITNESS: I told Dr. Chalquist that I was present both evenings. I told President Lovinger that I was present both evenings.

"(By Mr. Wesner) And what did you tell him that you did, if anything, so far as the demonstrations were concerned?

"THE WITNESS: I was a spectator, I told both men."

I respectfully submit that none of these observations are evidence of "participation" by Roberds in an unlawful disturbance which in any way "disrupts classroom work" or "involves substantial disorder" or is an "invasion of rights of others." *Tinker* v. *Des Moines Ind. Community School Dist.*, 393 U.S. 503, 513 (1969).

The majority opinion adds to the evidence the finding that Roberds "talked it up" by talking to others in the crowd. The evidence reflects that Roberds attended the demonstration for one-half hour one night and one hour the next. Roberds' supposed admission is his candid statement that he "mentioned my disgust with the college, and we talked, as the people I had talked to had the same feeling." Apropos here is the statement in *Tinker*, supra, at 511.

> "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress 'expressions of feelings with which they do not wish to contend.' *Burnside* v. *Byars, supra,* at 749."

The only evidence as to Roberds' conversations contradict the "finding" of the majority that he in any way "talked it up." Roberds testified:

> "On the nights of March 29 and 30, I was present at the demonstrations as a spectator. I did not participate in any activity. I did not cause any damage to any property. *I encouraged no one to cause any damage to any property.* I was merely a spectator. I feel I violated no state, local or federal laws.

"Mr. Achtenberg: Did you at any time advise Dean Chalquist that you intended to participate in any such demonstration?

"Stephen Roberds: No, I did not.

"Mr. Achtenberg: And did you participate in any such demonstrations?

"Stephen Roberds: No I did not." (My emphasis.)

This is no evidence that Roberds encouraged or incited any act of misconduct which in any way "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, supra, at 509.

Dr. Lovinger clearly had the authority to warn students that their participation in an unruly demonstration would subject them to disciplinary action. His observation and warning that students as spectators are often drawn into unruly demonstrations and that when they so participate they would be disciplined is beyond doubt a proper one. However, to suggest by regulation that anyone present at any demonstration which might become unruly may be punished, smacks of "prior restraint" and cannot be condoned. "[A] state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Cantwell* v. *Connecticut*, 310 U.S. 296, 308 (1940). "Prior restraint" on free expression and assembly is not permissible in any form. *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969), and see particularly J. Black's concurring opinion; *Carroll* v. *President and Commissioners*, 393 U.S. 175 (1968); *Thomas* v. *Collins*, 323 U.S. 516 (1944); cf. *Hammond* v. *South Carolina State College*, 272 F.Supp. 947 (D. S.C. 1967). A university or college cannot constitutionally place a ban on all student demonstrations simply because they *may* incite

some students to unlawful Acts. As the Supreme Court stated in *Tinker,* supra at 508-509:

> "But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom or on the campus, that deviates from the views of another person, may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello* v. *Chicago,* 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom —this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society."

In *Thomas* v. *Collins,* supra, the State of Texas attempted to prohibit union solicitation by distinguishing it from other forms of speech. This was accomplished by examining the understanding of the listener. The Supreme Court quickly reacted as we should here:

> "[This] puts the speaker . . . wholly at the mercy of the varied understandings of his hearers. . . . Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. . . . The effort to observe it could not be free speech, free press, or free assembly, in any sense of free advocacy of principle or cause. The restriction's effect, as applied, in a very practical sense was to prohibit." 323 U.S. at 535-36.

To hold each demonstrator or spectator at any mass demonstration responsible for the conduct of every other person present would place in jeopardy all rights of individuals to gather for peaceful petition. No individual could determine in advance whether a demonstration would be

peaceful. As has been observed, "The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate." *Carroll* v. *President and Commissioners,* 393 U.S. 175, 183 (1968). A peaceful demonstrator would always be faced with the alternatives of remaining at home or risking vicarious punishment for the violent actions of other demonstrators or even onlookers. This was recognized in *Barr* v. *City of Columbia,* 378 U.S. 146, 150 (1964), where the Court said of a group of peaceful demonstrators:

> "[T]he only evidence to which the city refers to justify the breach-of-peace convictions here, and the only possible relevant evidence which we have been able to find in the record, is a suggestion that petitioners' mere presence seated at the counter might possibly have tended to move onlookers to commit acts of violence. . . . [we reverse the conviction] . . . because of the frequent occasions on which we have reversed under the Fourteenth Amendment convictions of peaceful individuals who were convicted of breach of the peace because of the acts of hostile onlookers . . . ."

Presence alone, without any showing that the individual encouraged, incited, promoted or took part in a violent disturbance will not sustain a finding that he is a rioter. Cf. *Rollins* v. *Shannon,* 292 F.Supp. 580 (E.D. Mo. 1968); *Hunter* v. *Allen,* 286 F.Supp. 830 (N.D. Ga. 1968); *People* v. *Bundt,* 87 Cal.App.2d 735, 197 P.2d 823 (1948). See also Judge Oliver's opinion in *Scoggin* v. *Lincoln Univ.,* 291 F.Supp. 161 (W.D. Mo. 1968). To hold otherwise, in my opinion, violates every basic principle of due process the law is known to embrace.

I respectfully submit the evidence supports only the finding that Dr. Lovinger made: that Roberds was a mere spectator and was merely present at the demonstration.

Furthermore, the evidence is clear that the school did not discipline Roberds for being a participant in an "unlawful mass gathering" (although he was so charged) but for simply being present at the time others engaged in alleged unlawful acts. Herein should lie the importance of this decision. Mere presence at a demonstration is not and cannot be the basis for university regulations which attempt by "prior restraint" to prevent demonstration itself. Nor can it be the basis for state exclusion from educational opportunity.

In my opinion this constitutes a governmental encroachment on the exercise of free speech and free assembly and is incompatible with the Constitution of the United States. Roberds should be granted appropriate relief.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

TABLE OF CONTENTS

Table of Cases I

Statement of Case 1

Reasons for Denying Writ—

I. There Is No Direct Conflict Between the Circuits, No Undecided Federal Question and No Error 3

TABLE OF CASES

Barker v. *Hardway*, 283 F.Supp. 228 6

Buttny v. *Smiley*, 281 F.Supp. 280 6

Cornette v. *Aldridge*, 408 S.W.2d 935 6

Dickey v. *Alabama State Bd. of Educ.*, 273 F.Supp. 613 6

Goldberg v. *Regents*, 57 Cal. Rptr. 463 6

Jones v. *State Board of Education*, 407 F.2d 834 6

Soglin v. *Kauffman*, 295 F.Supp. 978 3

State ex rel. Sherman v. *Hyman*, 180 Tenn. 99 6

Tinker v. *Des Moines School Dist.*, 393 U.S. 503 6

Zanders v. *Louisiana State Bd. of Educ.*, 281 F.Supp. 747 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1026

ALFREDO ESTEBAN AND STEVE CRAIG ROBERDS,
Petitioners,

vs.

CENTRAL MISSOURI STATE COLLEGE, WARREN C. LOVINGER, PRESIDENT AND W. LESTER SIMPSON, PRESIDENT AND JOE HERNDON, LELAND J. CULP, VIRGINIA GOTTLIEB, BYRON CONSTANCE, AND J. N. CUNNINGHAM, MEMBERS OF THE BOARD OF REGENTS OF CENTRAL MISSOURI STATE COLLEGE,
Respondents.

RESPONDENTS' BRIEF AND SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE

Respondents will herein attempt to follow the reference procedure established in the petition (at page 2).

With exceptions noted below, respondents accept petitioners' "Statement of Case" (Petition page 5), "The Facts", including sub-paragraph "A" and "B" (Petition pages 5-11).

Respondents do not agree as stated in paragraph one (1), page 5, "Statement of Case", that petitioners were suspended ". . . for having participated in a mass demonstration . . ."

On the contrary, petitioners were each suspended on specific charges, to-wit (A 24-25):

CHARGE AGAINST ESTEBAN

(Dated October 18, 1967—Exhibit "B" to Complaint)

"You are hereby notified that you are charged with contributing to and participating in an unruly and unlawful mass gathering occurring on the 30th day of March, 1967, at and near Central Missouri State College in that you, the said Alfredo Esteban, did resist efforts of one Dr. M. L. Meverden in dispersing said mass gathering, failed and refused to identify yourself to Dr. Meverden as requested and used vile and obscene language towards and threatened a resident assistant of the College at Foster-Knox Hall."

CHARGE AGAINST ROBERDS

(Dated October 18, 1967—Exhibit "A" to Complaint)

"You are hereby notified that you are charged with contributing to and participating in an unruly and unlawful mass gathering occurring on or about the 29th and 30th day of March, 1967 at and near Central Missouri State College in that you, the said Stephen Craig Roberds, on the 5th day of February, 1967, directed correspondence to Mr. E. J. Cantrell of the Missouri Legislature evidencing your intention to participate in such mass gathering, did thereafter advise Dean Hollis Chalquist, Dean of Men, of your intention to participate in such demonstration at which time you were specifically advised that such participation would result in immediate suspension from Central Missouri State Col-

lege and that you did thereafter continue to contribute to and participate in said mass gathering all of which actions were in violation of the terms and provisions of your disciplinary probation."

Further, we do not agree with petitioners' statement at paragraph 1, page 6, of the petition that:

> "There was, however, no evidence that either student engaged in or organized any of these disruptive or destructive activities.'

Lastly, respondents disagree with and reject petitioners' "Summary of Evidence" (Petition p. 11) insofar as it seeks to draw conclusions and vary from the statement of facts.

REASONS FOR DENYING THE WRIT

I. There Is No Direct Conflict Between the Circuits, No Undecided Federal Question and No Error.

Petitioners contend that there is a ". . . clear, disagreement as to whether the 'void for vagueness and overbreadth' doctrine applies to student conduct regulations" (Petition p. 13), in the opinions of the Seventh Circuit in *Soglin* v. *Kauffman*, No. 17427 (Cir. 7, October 24, 1969), affirming the District Court opinion (295 F.Supp. 978) and the opinion of the Eighth Circuit in this case. This contention is apparently based on the unfounded and erroneous assumption that the Eighth Circuit has held that standards of vagueness and overbreadth are not applicable to cases involving college and university regulations.

In this connection we call the Court's attention specifically to the opinion at page 19 (A 37):

> "3. The regulations. These are additionally attacked for vagueness and overbreadth and hence no substantive due process grounds . . ." *The answers to all this, we think, are several. First, the college reg-*

ulations, per se, do not appear to us to constitute the fulcrum of plaintiffs' discomfiture (Emphasis added). The charges against Esteban and Roberds did not even refer to the regulations. Roberds was disciplined because he had participated in the demonstrations in the face of specific warning delivered by personal interview with the dean. This was defiance of proper college authority. Esteban was disciplined because of his refusal to comply with an appropriate request by Doctor Meverden and because of his childish behavior and obscenity toward college officials. This, too, was definance of proper college authority. There was no confusion or unawareness in either case. The exercise of common sense was all that was required. Each plaintiff knew the situation very well, knew what he was doing, and knew the consequences."

And subsequently and specifically the Court states (Opinion pp. 23, 24) (A 41):

"We do not hold that any college regulation, however loosely framed, is necessarily valid. We do not hold that a school has the authority to require a student to discard any constitutional right when he matriculates. We do hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct; that, as to these, flexibility and elbow room are to be preferred over specificity; that procedural due process must be afforded (as Judge Hunter by his first opinion here specifically required) by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures; that school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure; and that the courts should interfere only where there is a clear case of constitutional infringement."

It is therefore apparent that at the outset the Court of Appeals has rejected petitioners' argument attacking the regulations complained of for the simple reason that the regulations were not involved.

Further, at this point it is well to note that all of petitioners' assigned reasons for granting a writ of certiorari in this case are in their entirety an attack on various college regulations alleged to be "void for vagueness and overbreadth" and to violate petitioners' rights under the First Amendment when as a matter of fact the regulations so attacked were not the basis of petitioners' suspension from Central Missouri State College as the Court of Appeals has recognized.

Nowhere in its opinion does the Court of Appeals approve the regulations complained of by petitioners. It simply holds, 1) ". . . that a college has the inherent power to promulgate rules and regulations, that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct; that, as to these, flexibility and elbow room are to be preferred over specificity; that procedural due process must be afforded (as Judge Hunter by his first opinion here specifically required) by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures; that school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure; and that the courts should interfere only where there is a clear case of constitutional infringement." (Opinion p. 23, A 41).

This holding is not in conflict with the opinion of any other Circuit, does not involve unsettled questions of

Federal Law and is not erroneous, as contended by petitioners. It is, as indicated by the Court of Appeals in accord and agreement with *Barker* v. *Hardway*, 283 F.Supp. 228, aff'd 399 F.2d 638 (4 Cir. 1968), cert. denied, 394 U.S. 905, *Buttny* v. *Smiley*, 281 F.Supp. 280, 285, 286 (D. Colo. 1968), *Dickey* v. *Alabama State Bd. of Educ.*, 273 F.Supp. 613, 618 (M.D. Ala. 1967), *State ex rel. Sherman* v. *Hyman*, 180 Tenn. 99, 171 S.W.2d 822, 827 (1942), cert. denied, 319 U.S. 748, *Zanders* v. *Louisiana State Bd. of Educ.*, 281 F.Supp. 747, 757 (W.D. La. 1968), *Goldberg* v. *Regents*, 57 Cal. Rptr. 463, 472 (Ct.App. 1967) and *Cornette* v. *Aldridge*, 408 S.W.2d 935, 941 (Tex. Civ. App. 1966).

Nor is this case in conflict with the holding of this Court in *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969) wherein it was held that the wearing of armbands in the circumstances of the case was entirely divorced from actually or potentially distruptive conduct and where there was no evidence that authorities had reason to anticipate interference with and infringement of the rights of others. Such are certainly not the facts of the instant case. Likewise, the same is true of *Jones* v. *State Board of Education*, 407 F.2d 834 (6th Cir. 1969) (now on Cert. No. 731) which did not involve, as here, rioting, violence, destruction of property and wide spread interference with rights of others.

Petitioners seek to have this Court hold that certain college regulations, not the basis of their suspension, are void for vagueness and overbreadth and deprive them of their constitutional rights. In so doing they make a false issue directed toward a general holding by the Court which is unrelated to the actual facts.

We respectfully submit that the Court of Appeals has correctly, reasonably and with total authoritative sup-

port decided the real issues in this case and that certiorari should be denied.

Respectfully submitted,

JACKSON O. WRIGHT
1 Tate Hall
Columbia, Missouri
and
ROBERT L. WESNER
406½ South Ohio
Sedalia, Missouri
Attorneys for Respondents